Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARSH & MCLENNAN COMPANIES, INC.,
Petitioner,

v.

PALMER & CAY, INC. and JAMES B. MEATHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether constitutional principles of federalism and state sovereignty preclude a court from declaring that an otherwise valid contract cannot be enforced in any State because of one State's public policy against enforcing such contracts.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Marsh & McLennan Companies, Inc., has no parent corporation, and no publicly held entity owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marsh & McLennan Companies, Inc. respectfully requests that this Court issue a writ of certiorari to review a decision of the U.S. Court of Appeals for the Eleventh Circuit. This case presents important questions of federalism and state sovereignty—specifically, the ability of one State, based on its own public policy determinations, to control the enforcement of an otherwise valid contract outside its own borders.

OPINIONS BELOW

The opinion of the Eleventh Circuit (App. 1a - 22a) was issued on April 1, 2005 and is reported at 404 F.3d 1297. The Eleventh Circuit denied panel rehearing and rehearing en banc in an unpublished order on May 31, 2005 (App. 23a - 24a). The opinion of the U.S. District Court for the Southern District of Georgia, issued on November 11, 2003 (App. 25a – 44a), was not reported but is available electronically at 2003 WL 24096162.

JURISDICTION

The judgment of the Eleventh Circuit was entered on April 1, 2005. Petitioner filed a timely petition for panel rehearing and rehearing en banc, and that petition was denied on May 31, 2005 (App. 23a - 24a). This Court has jurisdiction to consider this Petition under 29 U.S.C. § 1254(1).

INTRODUCTION

In this case, the Eleventh Circuit has issued a decision that seriously undermines the ability of individual States to implement their own public policies as to the enforceability of contracts within their

own borders. Essentially, the Eleventh Circuit has held that a single State's public policy against enforcing a particular type of contractual provision—here, a non-solicitation agreement—can be extended to make the agreement unenforceable anywhere.

This decision will have potentially devastating consequences for the many commercial enterprises that use non-compete or non-solicitation agreements to protect their businesses from unfair opportunism by former employees and competitors. Under this decision, anyone who wishes to evade his obligations under a legitimate non-solicitation agreement may do so by suing for declaratory judgment in a court in Georgia (or perhaps in California, which shares Georgia's disapproval of non-compete agreements).

Even a corporation with no connection to Georgia may be the victim of this tactic where, as here, the former employee either takes up residence in Georgia or can argue that there is some other basis for asserting proper venue in the federal district courts of that State. Once there, the former employee may obtain declaratory relief holding the agreement unenforceable in any jurisdiction because, according to the Eleventh Circuit, the district court in such a case cannot limit the geographical reach of the relief. To the contrary, according to the decision below, the court must enter relief that purports to bind the parties in all future litigation, even if the offending conduct and the resulting litigation both occur in a State that does not share Georgia's abhorrence of non-solicitation agreements.

More broadly, the Eleventh Circuit's decision allows one State to control the enforcement of contracts in its sister States based on its own unique judgments about public policy. This result offends basic notions of

federalism and state sovereignty as recognized in the decisions of this Court. This Court's intervention is necessary to vindicate these important principles, to resolve the tension between the Eleventh Circuit's decision and previous decisions of this Court, and to prevent the nationwide invalidation of any non-solicitation agreement by any former employee who can find his way to a court in Georgia.

STATEMENT OF THE CASE

From early 1997 through early 2003, Respondent James B. Meathe was a senior executive at the national insurance brokerage firm Marsh USA Inc. ("Marsh"). Marsh is a wholly owned subsidiary of Petitioner Marsh & McLennan Companies. Meathe held the title of Managing Director and, beginning in 2000, served as the head of Marsh's Midwest Region, which at the time produced approximately $100 million in revenue. During his employment with Marsh, Meathe was a resident of Ohio, Michigan, and, finally, Illinois.

Before and during his employment with Marsh, Meathe entered into two covenants restricting his ability to take unfair advantage of his unique access to Marsh's clients and employees if he were to stop working for Marsh. The first (the "1997 Agreement") was part of a transaction in which Marsh & McLennan purchased Meathe's ownership interest in Johnson & Higgins, a company of which Meathe was previously a senior executive and part owner. In this transaction, Meathe surrendered his ownership interest and agreed to certain restrictions on his ability to compete with Marsh, and in exchange he received a cash payment of almost $3 million and an award of stock that was ultimately worth more than $10.6 million. The second agreement (the "2002 Agreement") related to Meathe's

ability to exercise certain Marsh & McLennan stock options—which ultimately enabled Meathe to realize a significant profit.

Each of these agreements contained separate covenants restricting Meathe's ability to solicit Marsh's clients and employees following the termination of his employment, for a period of one year under the 1997 Agreement and for two years under the 2002 Agreement. Moreover, to ensure that these covenants would be enforceable, the parties agreed to a choice-of-law provision specifying that New York law—which enforces such agreements—would govern.

Meathe resigned his post at Marsh on January 1, 2003, and exactly one month later joined forces with one of Marsh's direct competitors, Respondent Palmer & Cay, Inc. Sometime after accepting this position, Meathe left the Midwest—where he had lived all his life—and moved to Georgia. Upon learning that Meathe had moved to Georgia, Marsh & McLennan informed him that it did not intend to seek enforcement of one aspect of the agreements—namely, the term preventing Meathe from "accepting" unsolicited work from former Marsh clients—so that there would be no doubt about the agreements' compliance with Georgia law.

Nevertheless, on May 21, 2003, within just a few months of his resignation from Marsh, Meathe and Palmer & Cay filed a complaint in the Southern District of Georgia against Marsh & McLennan, seeking to declare the non-solicitation covenants in both the 1997 and 2002 Agreements unenforceable in their entirety under Georgia law. The complaint also sought an injunction that would prevent Marsh & McLennan from seeking enforcement of these non-solicitation contracts in any jurisdiction in the world.

The district court granted judgment on the pleadings in favor of the plaintiffs, holding that the non-solicitation agreements were unenforceable in Georgia. The court based its conclusion on the Georgia Supreme Court's decision in *Convergys Corp.* v. *Keener*, 582 S.E.2d 84, 85 (Ga. 2003), which established that Georgia would no longer enforce a contractual choice of law provision if the law selected by the parties conflicted with Georgia law on the enforceability of non-solicitation agreements. Thus, even though New York law (and the laws of dozens of other states) would ordinarily mandate the enforcement of non-compete or non-solicitation agreements like the ones at issue here, the district court held that the agreements were unenforceable in Georgia because, as a matter of state law, the "acceptance of unsolicited business" provision was contrary to Georgia's public policy and thus rendered the agreements unenforceable in their entirety. Accordingly, the district court issued a declaratory judgment holding that the agreements were "unenforceable within the State of Georgia." App. 43a. The district court also enjoined Marsh "from enforcing [these agreements] against Meathe in Georgia." *Id* at 43a-44a.

The district court then certified the declaratory judgment and injunction for immediate appeal under Federal Rule of Civil Procedure 54(b), finding "no just reason for delay." Marsh & McLennan appealed both aspects of the district court's decision, and Meathe and Palmer & Cay filed a cross-appeal, asserting that the district court had failed to consider whether to issue a declaratory judgment and enjoin enforcement of the agreements outside Georgia.

The Eleventh Circuit affirmed in part, vacated in part, and remanded the case for further proceedings.

App. at 22a. With respect to the 1997 Agreement, the court found that the district court had erred in granting judgment on the pleadings because there remained material issues of fact. *Id.* at 14a. With respect to the 2002 Agreement, however, the court took issue only with the scope of the relief. *Id.* at 15a-16a.

Although the Eleventh Circuit concluded that the district court had properly limited its *injunctive* relief to Georgia, it also concluded that the *declaratory* judgment should not have been so limited. In *Keener* v. *Convergys Corp.*, 342 F.3d 1264 (11th Cir. 2003), the Eleventh Circuit had made clear that a district court cannot enjoin the enforcement of a non-solicitation agreement nationwide, when the agreement—although invalid under Georgia law and public policy—had selected another State's law. App. 18a. Although *Keener* governed with respect to the injunctive relief, the Eleventh Circuit held that the district court should not have placed a geographic limitation on the scope of the declaratory relief, given that Georgia courts themselves do not limit the scope of declaratory relief in similar cases. App. 21a-22a (citing *Hostetler* v. *Answerthink*, 599 S.E.2d 271, 275 (Ga. Ct. App. 2004) (noting that under Georgia law of claim and issue preclusion, a final declaratory judgment with respect to a non-compete agreement precludes subsequent claims from being relitigated in other States)). The court also noted that as a matter of federal common law, the preclusive effect of the declaratory judgment in this case would be determined by the "enforcing" court through reference to how Georgia courts would themselves treat the judgment for purposes of claim preclusion. App. 21a (citing *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497 (2001)). Accordingly, the Eleventh Circuit vacated the declaratory judgment only "to the extent it attempted to limit relief to Georgia." *Id.*

REASONS FOR GRANTING THE PETITION

The central question in this case is whether considerations of federalism and state sovereignty preclude the application of one State's law to preempt the laws of 49 other States with respect to the enforceability of non-compete or non-solicitation agreements. The Eleventh Circuit's decision carries ramifications far beyond the parties in this case. It creates a regime in which any former employee seeking to extricate himself from a nationwide non-solicitation agreement will be able to do so simply by racing to federal or state court in Georgia and filing a declaratory judgment action.

There is today no national public policy against the application and enforceability of post-employment non-solicitation agreements. Indeed, the law on the enforceability of such contracts varies dramatically from State to State. *See* BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (4th ed. 2003) (surveying relevant common law and statutory provisions of all 50 states). The Eleventh Circuit's decision, however, elevates one State's public policy above all others, stripping other States of the power to reach a different conclusion and to require employees to live up to their contractual obligations.

The Eleventh Circuit's decision, moreover, was not an exercise in contractual interpretation; to the contrary, the terms of the agreement are clear. The issue here is whether a court may use Georgia public policy to override a contract's clear meaning, not just in that State but in all other States as well, and particularly in States—such as New York, Michigan, and others—that *would* recognize the parties' choice of law provisions and enforce the kind of post-

employment agreement at issue here. *See generally* COVENANTS, *supra.*

As discussed below, the Eleventh Circuit's decision undermines important principles of state sovereignty and federalism that are reflected in the structure of the Constitution and embodied in, among other things, this Court's recent decision in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), and a host of other cases recognizing each State's inability to control matters within the boundaries of another State. This Court should grant review to ensure that these principles are not eroded by the decision below and to avoid the perverse, nationwide consequences that the decision below will otherwise create.

I. The Eleventh Circuit's decision makes one State's public policy choice binding against all other States, in conflict with principles of federalism and state sovereignty recognized in this Court's decisions.

This Court has long held that the structure and content of the U.S. Constitution protects each State from incursions by other States, ensuring that each State maintains its status as a sovereign of "equal dignity." *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). The Constitution gives Congress alone the power to intrude upon a State's sovereign right to control conduct within the borders of its territory—as, for example, when Congress regulates interstate commerce. U.S. CONST., art. I, § 8, cl. 3.

Based on these principles, this Court has held again and again that a State may not use its own law to regulate conduct in other States. *See, e.g., Baker* v.

General Motors Corp., 522 U.S. 222, 241 (1998) ("a Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568-73 (1996) (Alabama jury could not punish a defendant for conduct that took place elsewhere); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (one State may not "project its legislation" into other States); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality) (state statute impermissibly regulated transactions that occurred entirely in other States). Indeed, this Court has explained that "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408, 422 (2003) (holding that one State's award of punitive damages could not be based upon conduct in another State).

The application of these principles in contract cases has been clear for more than one hundred years. In *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914), this Court invalidated one State's attempt to limit the term of an out-of-state contract. The Court explained that to allow one State to impose such limitations would

> throw[] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called

> into question and hence authorities directly dealing with it do not abound.

Id. at 161.

To some extent, the Full Faith and Credit Clause necessarily "alter[s] the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others." *Baker*, 522 U.S. at 232 (quoting *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268, 277 (1935)). But even that principle "does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Nevada* v. *Hall*, 440 U.S. 410, 423-24 (1979) (quoting *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939)).

In short, the Court has consistently viewed the constitutional structure as implying a necessary principle of federalism, which is that "[e]ach State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907).

The Eleventh Circuit's decision undermines these important principles and conflicts with the cases that recognize them. Georgia's rule against enforcing certain non-solicitation agreements ancillary to employment relationships is based upon its own unique "public policy" judgment with respect to "competition among businesses." *Convergys Corp.* v. *Keener*, 582 S.E.2d 84, 86-87 (Ga. 2003); *W.R. Grace & Co.* v. *Mouyal*, 422 S.E.2d 529, 531 (Ga. 1992) (non-compete agreement can be enforced only if it "is not unreasonable, is founded on a valuable consideration,

and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public"). If a Georgia court finds a single term of a non-solicitation agreement unreasonable, the court will refuse to enforce the entire agreement. *See, e.g., Harville* v. *Gunter*, 495 S.E.2d 862, 864 (Ga. Ct. App. 1998) (refusing to sever an offending term). Georgia courts will hold such an agreement unenforceable even if the parties agreed to have a different State's law govern, as long as the application of Georgia law to the dispute is neither arbitrary nor constitutionally impermissible. *Convergys Corp.*, 582 S.E.2d at 85-87. These principles reflect Georgia's own unique judgment about the anti-competitive effect of such agreements and its conclusion that such a judgment can and should override the policy of honoring the reasonable expectations of parties to a contract.

Now, according to both the Eleventh Circuit and the Georgia courts, this state-specific public policy can result in a declaratory judgment that purports to bar enforcement of a non-solicitation agreement—not just in Georgia—but anywhere in the Nation. *See* App. 21a-22a; *Hostetler* v. *Answerthink, Inc.*, 599 S.E.2d 271, 275 (Ga. Ct. App. 2004) (noting that once Georgia court holds agreement unenforceable, principles of claim and issue preclusion should prevent relitigation in any other State). Such a declaratory judgment would likely bind the parties in all other jurisdictions as well, whether the declaratory judgment was issued by a Georgia state court or by a federal district court sitting in diversity within the State of Georgia. *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982) (full faith and credit requires courts to give "the same preclusive effect to state court judgments that those judgments would be given in the courts of the State

from which the judgments emerged"); *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (as under full faith and credit, claim-preclusive effect of a disposition by a federal court sitting in diversity is governed by federal common law, which in turn incorporates the law of the State in which the federal court that rendered the decision sits).

If the Eleventh Circuit's decision permitting an unlimited declaratory judgment based upon Georgia public policy is allowed to stand, Georgia's public policy determinations will be thrust upon the other sovereign States, even with respect to transactions entirely within their own borders. This result stands in direct contradiction to the decisions of this Court discussed above, which preclude one State from extending its own policy judgments outside its own territory.

II. The decision below creates a perverse regime in which any employee can achieve nationwide invalidation of a non-solicitation agreement, or any other type of agreement, if he can mount a successful race to a courthouse in Georgia or another State that disfavors such agreements.

As a practical matter, the obvious effect of the Eleventh Circuit's decision is to create a regime in which *any* employee can achieve nationwide invalidation of a non-solicitation agreement (or any other type of agreement) simply by racing to a courthouse in a State – such as Georgia – that disfavors such agreements. This is a matter of serious, nationwide importance to all employers as well as to

States that might take a different view on the policy at issue.[1] And it is perverse for at least three reasons.

First, regardless of the merits of non-solicitation agreements (or any other agreement that a party might seek to invalidate on public policy grounds), this regime largely deprives the individual States of their ability to make their own policy choices on such matters. As discussed above, our federal system is predicated on the notion that the States, as

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[1] Indeed, many types of contractual provisions are enforceable in one State but not in another, and therefore the ploy used by the plaintiffs here could be used in a wide variety of circumstances. For example, an employee might use this tactic to seek a nationwide declaratory judgment that effectively invalidates his agreement to arbitrate disputes with his employer, based on Louisiana's "strong public policy against forum selection clauses in employment contracts," including arbitration agreements. *Lim* v. *Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 900 (5th Cir. 2005), *petition for cert. filed*, No. 04-1716 (U.S. June 17, 2005). Similarly, a party could potentially avoid a contractual indemnification clause by seeking declaratory judgment in New York, which holds such clauses unenforceable as against public policy "to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury." *Austro* v. *Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 676 (1985). *See also, e.g., Armendariz* v. *Foundation Health Psychare Svcs., Inc.*, 24 Cal. 4th 83, 103 (2000) (refusing to enforce arbitration clause limiting remedies); MONT. CODE ANN. § 28-2-2116 (2003) (choice-of-law clause in a construction contract that is "in, collateral to, or affects a construction contract for a project in this state..." is "against the public policy of this state and . . . void and unenforceable"). Any such policy disagreement could result in the perverse results described in the text.

"laboratories of democracy,"[2] are and should be free to take varying positions on important policy issues, free from interference by other States.

Second, the decision below threatens to deprive U.S. employers—and therefore the national economy—of the substantial economic benefits of non-solicitation agreements.[3] Among other things, non-solicitation agreements allow employers to invest in their key employees—by training them and entrusting them with trade secrets—secure in the knowledge that those "human capital" investments will not be used to the company's detriment, at least for a time, if the

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[2] *See New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[3] These benefits have been recognized repeatedly in the academic literature. *See, e.g.*, Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93 (1981) (non-compete agreement is efficient in protecting the investment of an employer in training employees); ERIC A. POSNER & GEORGE G. TRIANTIS, COVENANTS NOT TO COMPETE FROM AN INCOMPLETE CONTRACTS PERSPECTIVE (Sept. 26, 2001) (John M. Olin Program in Law & Economics Working Paper No. 137, 2d Series) (non-compete agreements can be used to efficiently "balance out over- and underinvestment incentives when the employer makes a general investment."); *see also* Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 51-53 (2001); M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137, 138-40, 143 (2003).

employee decides to leave: "The employer's only means of protecting his investment in such capital is to prevent the employee from using his training or divulging the acquired information for a given period. By so doing, the employer effectively can convert the general human capital that he has financed into specific human capital." Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 717 (1985); *see also* William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 26 (2001) ("Needless to say, given the amount of time and money employers invest in recruiting and training their employees, watching them depart to competitors is an unhappy experience."). By making it more risky for businesses to make such investments, the Georgia rule reduces businesses' efficiency and, in turn, will likely impair businesses' ability to provide income for employees and shareholders and to provide goods and services to their customers at reasonable prices.

Obviously, Georgia policymakers have determined that the alleged costs of non-solicitation agreements—*i.e.*, their potential to reduce competition—outweigh these benefits. But Georgia's judgment is not obviously correct. And if that judgment is wrong (as we believe it is), the decision below could impose enormous costs on the entire U.S. economy.

Third, the Eleventh Circuit's analysis will have a perverse effect on the administration of justice nationwide. Once an employment relationship ends, employees will search for a way to establish venue for a declaratory judgment action in the federal or state courts in Georgia—or perhaps in California, which in some respects shares Georgia's extremely restrictive view of non-solicitation agreements. *See, e.g.*,

Application Group, Inc. v. *Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 75 (Cal. Ct. App. 1998) ("California law may be applied to determine the enforceability of a covenant not to compete . . . when a California-based employer seeks to recruit or hire the nonresident [employee] for employment in California"). To do so, the employee could take up residence in Georgia or accept a position with a Georgia corporation. *See, e.g., Enron Capital & Trade Res. Corp.* v. *Pokalsky*, 490 S.E.2d 136 (Ga. Ct. App. 1997) (employee sued in Georgia and invoked Georgia law on ground that he had accepted employment with a Georgia corporation).

The employer, on the other hand, will likely rush to file a similar suit in a different State that would enforce the non-solicitation agreement—or at least that would respect the parties' contractual choice of law. This situation would be damaging both to the reasonable expectations of contracting parties and to the administration of justice throughout the country.[4]

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[4] Press coverage following the decision in this case highlighted these problems. *See, e.g.*, Molly McDonough, *Noncompete Pact Hits Georgia Roadblock; State's Ruling Should Have National Effect, 11th Circuit Says*, ABA JOURNAL EREPORT, Apr. 15, 2005 ("The race to the courthouse is on."); Jonathan Ringel, *11th Circuit Finds Marsh & McLennan's Noncompete Agreement Unenforceable*, FULTON COUNTY DAILY REPORT, Apr. 6, 2005 (quoting one commentator as saying, "Unless you have a noncompete [agreement] that is squeaky clean under Georgia law, . . . you need to get to some other court first"); *Appeals Panel Holds Broker Marsh's Noncompete Agreement Unenforceable*, BESTWIRE, Apr. 11, 2005 (because of its extension of Georgia policy to control enforcement everywhere, decision "would likely encourage the 'race to the courthouse'").

Moreover, if one State has the ability to declare a contract unenforceable anywhere based on its own public policy, the race to the courthouse may also lead to conflicts between state courts in parallel actions. For example, in *Advanced Bionics Corp.* v. *Medtronic, Inc.*, 59 P.3d 231 (Cal. 2002), an employee filed suit in California to have a non-compete agreement declared unenforceable, based on California public policy. Meanwhile, the employer filed a complaint in Minnesota to enforce the agreement and its Minnesota choice-of-law clause. Each court ultimately issued an injunction preventing the parties from pursuing litigation in the other forum. *See* 59 P.3d at 234; *Medtronic, Inc.* v. *Advanced Bionics Corp.*, 630 N.W.2d 438, 446 (Minn. Ct. App. 2001) (noting that the Minnesota trial court "issued a temporary injunction prohibiting [the employee] from interfering with the non-compete agreement"). Ultimately, the California Supreme Court blinked first, yielding to the Minnesota courts as a matter of judicial restraint and comity. 59 P.3d at 235-38. [5]

A Georgia court might not have been so accommodating, given the Georgia legislature's conclusion that, in general, comity to other States' laws (other than what is required by the U.S. Constitution) should cede to any contrary policies of the State of Georgia. *See* GA. CODE ANN. § 10309 (2000). In light of

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[5] *See generally* Christopher D. David, Note, *When a Promise Is Not a Promise: Georgia's Law on Non-Compete Agreements, as Interpreted by the Eleventh Circuit in* Keener v. Convergys Corp., *Gives Rise to Comity and Federalism Concerns*, 11 J. INTELL. PROP. L. 395, 408-410 (2004) (discussing the *Medtronic* situation); *see also* Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 26-28 (2002).

that statutory provision, a declaratory judgment action in Georgia would likely proceed in parallel with a similar suit in another State as each party raced to have its respective chosen forum be the first to issue a declaratory judgment concerning the enforceability of the agreement. And as long as the Georgia court is the first to issue its judgment—a policy-based judgment which, according to the Eleventh Circuit, need not limit itself to the State of Georgia—the other State would, under the decision below, be bound by Georgia's public policy choice.

* * * * *

In sum, the Eleventh Circuit's decision allows the public policy of one State—in this case Georgia—to override the clear terms of a contract and to make it unenforceable, even in any other State that does not share the same policy concerns. That ruling conflicts with the well-established law of this Court recognizing that no State has the power to control conduct in other States. And it creates perverse, nationwide consequences that only this Court can prevent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2005

APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16248

D.C. Docket No. 03-00094-CV-4

PALMER & CAY, INC., a Georgia corporation,
Plaintiff-Appellate-Cross-Appellant,

JAMES B. MEATHE,
Plaintiff-Appellate-Cross-Appellant,

v.

MARSH & McLENNAN COMPANIES, INC.,
A Delaware corporation,
Respondent-Appellee.

Appeals from the United States District Court for
the Southern District of Georgia
No. 4:03-CV-00094-BAE—B. Avant Edenfield, Judge.

(APRIL 1, 2005)

Before BIRCH, BARKETT and COX, Circuit Judges.

BIRCH, Circuit Judge:

This appeal arises from two employee and client non-solicitation agreements entered into between James B. Meathe, an insurance executive, and Marsh and McLennan Companies, Inc. ("MMC"), his former employer. The district court granted judgment on the pleadings in favor of Meathe and his current employer, Palmer & Cay, Inc. ("P&C"), and held that the agreements were unenforceable "within the state

of Georgia" under Georgia public policy. The district court enjoined MMC from attempting to enforce the agreements within the state. We must determine whether the district court correctly granted judgment on the pleadings, and if so, whether it correctly curtailed the geographic scope of the declaratory judgment and injunctive relief to Georgia. We AFFIRM in part, VACATE in part, and REMAND for proceedings consistent with this opinion.

I. BACKGROUND

As of March 1997, Meathe was employed at Johnson & Higgins ("J&H"), a national insurance brokerage. That spring, MMC acquired all outstanding shares of J&H, and J&H was merged into MMC. Meathe owned stock in J&H at the time of the sale.[1] In the exchange, he received a cash payment and shares of MMC stock,[2] and he agreed to be bound by certain customer and employee non-solicitation

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[1] According to Meathe and P&C's Brief in Support of Motion for Judgment on the Pleadings, Meathe was one of 49 shareholders in J&H and owned 185 out of its 54,965 shares (or approximately one-third of one-percent of the company). R1-17 at 13. To support this assertion, they cite Annex A to the Stock Purchase Agreement. The Stock Purchase Agreement is attached as an Appendix to their brief, but Annex A to the Agreement is not included. None of the parties' pleadings support the assertion. Although MMC does not appear to dispute the percentage of J&H stock Meathe owned, we decline to rely on this unsupported factual allegation contained only in the parties' briefs.

[2] MMC asserts that Meathe received $2,921,699 in cash and 255,716 shares of MMC stock, which, distributed to Meathe over a four-year period, had an "ultimate value" of $10,641,347. R2-25 at 11-12 ¶ 9. Meathe admits this assertion in Plaintiffs' Answer. *See* Plaintiffs' Answer to Defendant's Amended Counterclaims. R2-27 at 3 ¶ 9. However, in Plaintiffs' Reply Brief in Support of Motion for Judgment on the Pleadings, P&C and Meathe contend that Meathe was paid $1,128,628 in cash and $2,257,256 worth of MMC stock, or $3,385,884 in total R2-22 at 5 n.3. They contend that MMC arrives at the $10,641,347 "ultimate" figure by citing a later sale of the stock, which takes into account the stock's increase in value over time. *Id.*

covenants incorporated into a written agreement ("the 1997 Agreement").[3]

The 1997 Agreement, entitled "STOCK PURCHASE AGREEMENT among JOHNSON & HIGGINS, THE STOCKHOLDERS OF JOHNSON & HIGGINS and MARSH & MCLENNAN COMPANIES, INC.," represents that it is between J&H, the "Seller[s]", or J&H stockholders listed on Annex A to the 1997 Agreement, and the "Buyer," MMC. R1-17, App. A, at 1. Although their submissions do not include Annex A, the parties do not dispute that Meathe sold his stock as part of the 1997 Agreement. Section 6.13(b) of the 1997 Agreement sets out the non-competition and non-solicitation provision applicable to Meathe, who was not a director of J&H:

Section 6.13 *Non-Competition and Non-Solicitation.*

. . . .

> (b) Each Seller who is not a director of the Company as of the date hereof hereby agrees that during the Non-Solicit Period, such Seller will not (x) solicit, accept or service business that competes with businesses conducted by the Company, Buyer or any of their Subsidiaries (i) from any clients or prospects of the Company or its affiliates who were solicited directly by Seller or where Seller supervised, directly or indirectly, in whole or in part, the solicitation activities related to such clients or prospects or (ii) from any former client who was such within two (2) years prior to such termination and who was solicited directly by Seller or where Seller supervised, directly or indi-

[3] According to MMC, Meathe entered into the 1997 Agreement "in exchange for" the consideration he received in the sale. R2-25 at 12 ¶ 10. Meathe denies that the 1997 Agreement was entered into "in exchange for" the cash payment and shares of stock, R2-27 at 3 ¶ 10, and alleges that the agreement was entered into "both in connection with Meathe's employment by Marsh & McLennan and the sale by Meathe of his interest" in J&H. R1-4 at 3 ¶ 12.

> rectly, in whole or in part, the solicitation activities related to such former client; or (y) solicit any employee of the Company or its affiliates to terminate his employment.

Id. at 69-70.[4] The section also establishes the length of the non-solicitation period:

> The Non-Solicit Period shall commence on the Closing Date and end on the later of the fifth anniversary of the Closing Date and the second anniversary of the date on which such Seller is no longer employed by the Company, Buyer or any of their respective Subsidiaries.

Id. at 70. The 1997 Agreement's "Definitions" section contains a list of five individuals whose actual knowledge could impute knowledge to J&H for purposes of the agreement. Meathe is not included on the list. *Id.* at 105, § 11.3(d). Additionally, the agreement contains a merger clause. *Id.* at 89, § 10.4.

MMC employed Meathe from March 1997 to 2003. By 2003, Meathe was Managing Director and Head of the Midwest Region for Marsh USA, Inc., one of MMC's subsidiary corporations. R2-25 at 13 ¶ 13; R2-27 at 4 ¶ 13. In this position, according to MMC, Meathe's duties included soliciting and servicing clients in Marsh's Midwest region, supervising 2,600 sales employees, formulating business strategy, managing Marsh's finances for the region, and crafting business policies and procedures. R2-25 at 13 ¶ 14.[5] According to MMC, Meathe had access to confidential information relating to the servicing of clients. MMC alleges that this information, not known outside of the company, gives Marsh a

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[4] Section 6.13(a) sets out the non-competition and non-solicitation provision applicable to J&H directors who sold stock as part of the transaction. *See id*

[5] Meathe denies that his duties included the solicitation of clients. R2-27 at 4 ¶ 14.

competitive advantage in the marketplace.[6] R2-25 at 14 ¶ 15. In 2003, MMC paid Meathe approximately $725,000 in salary and bonuses. R2-25 at 13 ¶ 13.

On 27 December 2002, Meathe signed another client and employee non-solicitation agreement ("the 2002 Agreement") in exchange for rights to exercise certain MMC stock options.[7] R2-25 at 12-13 ¶ ¶ 11, 12. In the 2002 Agreement, Meathe agreed to be bound by customer and employee non-solicitation covenants set to expire two years after Meathe's last day of work at MMC, provided his employment with MMC ended within three years of his exercising the stock options. Meathe promised not to:

> (a) solicit or accept business of the type offered by the Company during my term of employment with the Company, or perform or supervise the performance of any services related to such type of business, from or for (i) clients or prospects of the Company or its affiliates who were solicited or serviced directly by me or where I supervised, directly or indirectly, in whole or in part, the solicitation or servicing activities related to such clients or prospects; or (ii) any former client of the Company or its affiliates who was such within two (2) years prior to my termination of employment and who was solicited or serviced directly by me or where I supervised, directly or indirectly, in whole or in part, the solicitation or servicing activities related to such former clients; or
>
> (b) solicit any employee of the Company who reported to me directly or indirectly to terminate his employment with the Company for the purpose of

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[6] Meathe denies these assertions. R2-27 at 4 ¶ 15.

[7] According to MMC, Meathe exercised the options for a $252,678.30 profit. R2-25 at 13 ¶ 12. Meathe denies this assertion and claims that the consideration given for the 2002 Agreement was his employment. R2-27 at 3 ¶ 12.

competing with the Company.

R1-17 at App. B. Meathe also recognized and acknowledged MMC's trade secrets and confidential proprietary information and promised not to disclose them or use them for the benefit of himself or an entity other than Marsh.[8]

Meathe left Marsh's employ on 1 January 2003. R2-25 at 13 ¶ 13; R2-27 at 4 ¶ 13.[9] In February 2003, Meathe became President of P&C, an insurance brokerage company and direct competitor of Marsh. R2-25 at 14 ¶ 16; R2-27 at 4 ¶ 16. Meathe moved to Georgia around that time. According to MMC, MMC informed Meathe on 24 July 2003 that it would not attempt to enforce the contract term in the 2002 Agreement that prohibited Meathe from accepting business from clients who switched, on their own and unsolicited by Meathe, to P&C. R2-22 at 14 ¶ 17. MMC contends that it took this measure to modify the 2002 Agreement so as to bring it into conformance with Georgia law.

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[8] Specifically, the agreement provided:

> I [Meathe] recognize and acknowledge that the Company's trade secrets and confidential or proprietary information, including such trade secrets or information as may exist from time to time, are valuable, special and unique assets of the Company's business, access to and knowledge of which were essential to the performance of my duties while in the employ of the Company. I will not, during or after the term hereof, in whole or in part, disclose such secrets or confidential or proprietary information to any person, firm, corporation, association or other entity for any reason or purpose whatsoever, nor shall I make use of any such property for my own purposes or for the benefit of any person, firm, corporation or other entity (except the Company) under any circumstances, during or after the term hereof, provided that after the term hereof, these restrictions shall not apply to such secrets or information which are then in the public domain (provided that I was not responsible, directly or indirectly, for such secrets or information entering the public domain without the Company's consent).

R1-17, App. B.

[9] Meathe alleges that he left Marsh by mutual agreement. R2-27 at 4 ¶ 13.

Although the 1997 Agreement's five-year non-solicitation period had expired by the time P&C employed Meathe, both the 1997 Agreement and 2002 Agreement's two-year non-solicitation periods, set to expire 1 January 2005, were still in effect. In district court, Meathe and P&C sought a judgment enjoining MMC from enforcing the 1997 Agreement and the 2002 Agreement. MMC counterclaimed, arguing, *inter alia*, that Meathe violated covenants of the 1997 and 2002 Agreements in order to expand P&C's business in the Midwest.[10] Meathe and P&C moved for judgments on the pleadings. Granting their motions in part, the district court declared the 1997 and 2002 Agreements "unenforceable within the State of Georgia" and enjoined MMC from enforcing the covenants "against Meathe in Georgia." *Palmer & Cay, Inc.* v. *Marsh & McLennan Cos.*, No. 403CV094 at 11 (S.D.Ga. Nov. 11, 2003) (order granting judgment on the pleadings).

On 26 November 2003, MMC filed a timely notice of interlocutory appeal under 28 U.S.C. § 1292(a)(1). On 1 December 2003, the district court ruled *sua sponte* that there was "no just reason for delay" and certified the case for immediate appeal, pursuant to Federal Rule of Civil Procedure 54(b). R2- 30. In its order, the district court stayed discovery pending appeal and administratively closed the case, subject to a reopen motion by any party with standing. P&C and Meathe filed a timely notice of cross appeal.

On appeal, MMC argues that the district court erred by (1) failing to follow the standard for judgments on the pleadings, dictated by Federal Rule of Civil Procedure 12(c), by drawing factual inferences against MMC, the non-movant; and (2) concluding that the 1997 and 2002 Agreements were

[10] Specifically, MMC alleges that Meathe has induced Marsh employees to resign from MMC to join P&C and has solicited certain Marsh clients to leave Marsh and bring their business to P&C. MMC also alleges that Meathe has used and disclosed MMC/Marsh confidential business information and trade secrets.

unenforceable under Georgia law.[11] On cross-appeal, P&C and Meathe contend that the district court erred in limiting the scope of its injunction and declaratory judgment to Georgia under *Keener* v. *Convergys Corp.*, 342 F.3d 1264 (11th Cir. 2003).

II. DISCUSSION

A. *Standard of Review*

We review the district court's grant of judgment on the pleadings *de novo*. *Horsley* v. *Feldt*, 304 F.3d 1125, 1131 (11th Cir.2002). "'Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.' " *Riccard* v. *Prudential Ins. Co.*, 307 F.3d 1277, 1291 (11th Cir.2002) (citation omitted). The court must view the facts "in the light most favorable to the nonmoving party," and it can grant the motion only if the non-movant "'can prove no set of facts'" which would allow it to prevail. *Horsley*, 304 F.3d at 1131 (citation omitted).

B. *The 1997 Agreement*

Under Georgia law, the level of scrutiny applied to a covenant not to compete depends on whether it is ancillary to the sale of a business or ancillary to employment.[12] If ancillary to

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[11] MMC also argues that the district court erred in failing to enforce independently the employee non-solicitation covenants of the 1997 and 2002 Agreements. We conclude that MMC did not raise this issue in the district court. Because MMC's appeal presents none of the "exceptional circumstances" in which we may exercise appropriately our discretion to hear issues raised for the first time on appeal, we do not consider this argument. *See Dean Witter Reynolds, Inc.* v. *Fernandez*, 741 F.2d 355, 360-61 (11th Cir.1984).

[12] A third level of scrutiny applies to professional partnership agreements. Georgia courts apply intermediate scrutiny because signatory partners hold relatively equal bargaining power, enjoy mutual advantage from the restrictive covenants, and share equally in the consideration. *See Physician Specialists in Anesthesia, P.C.* v. *MacNeill*, 246 Ga.App. 398, 539 S.E.2d 216, 221 (2000).

the sale of a business, a covenant can be enforced "'to the extent that it is found essential ... to protect the purchaser, despite the overbreadth of the covenant.'" *White* v. *Fletcher/Mayo/Assocs., Inc.*, 251 Ga. 203, 205, 303 S.E.2d 746, 749 (1983) (quoting *Redmond* v. *Royal Ford, Inc.*, 244 Ga. 711, 261 S.E.2d 585, 587 (1979) (per curiam)). Georgia courts apply a low level of scrutiny to agreements ancillary to the sale of a business, *Swartz Invs., LLC* v. *Vion Pharm., Inc.*, 252 Ga.App. 365, 368, 556 S.E.2d 460, 463 (2001), and they can reform, or "blue-pencil,"[13] any objectionable portions to bring them in conformance with Georgia law, *White*, 303 S.E.2d at 749. Georgia courts reason that these covenants form part of the bargained-for exchange in the sale:

> [T]he buyer pays and the seller receives a part of the total purchase price as consideration for that covenant. The buyer frequently would not buy the business if the seller were free to begin competing immediately. By restricting the territory to an area less than that specified in the covenant, the court requires the seller to do that which the buyer and seller bargained for, yet in a smaller area than that agreed to by the seller.

Id. at 749; *see also Hood* v. *Legg*, 160 Ga. 620, 128 S.E. 891, 895 (1925) (noting that sale of business covenants should be upheld because, *inter alia*, the seller was compensated for the covenant, and the covenant does not restrict trade because the business will be carried on by the buyer).

On the other hand, a covenant ancillary to employment is "'enforceable only where it is strictly limited in time and territorial effect and is otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee.' " *White*, 303 S.E.2d at 748 (cita-

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[13] In Georgia, the term "blue pencil" is defined as "judicial editing of covenants which were not written in such a way that they are divisible by simply excising certain parts or words from them." *White*, 303 S.E.2d at 748 n. *.

tion omitted). Georgia courts apply strict scrutiny, *Swartz Invs., LLC,* 556 S.E.2d at 463, and they cannot blue-pencil covenants, unenforceable in their entirety, to sever overreaching provisions. *White,* 303 S.E.2d at 748. Recognizing that employees often choose not to challenge illegal covenants in hopes of maintaining good relations with former employers, the Georgia Supreme Court refuses to reform even reasonable employment covenants in order to discourage employers from fashioning overly broad covenants that will remain unchallenged in most instances. *See id.* at 748-49 & n.* *. In other words, if an otherwise valid contract contains one overly broad non-solicitation or non-competition covenant, the other non-solicitation or non-competition covenants in the same agreement are automatically rendered unenforceable. *Ward* v. *Process Control Corp.*, 247 Ga. 583, 584, 277 S.E.2d 671, 673 (1981); *Advance Tech. Consultants, Inc.* v. *Roadtrac, LLC,* 250 Ga.App. 317, 320, 551 S.E.2d 735, 737 (2001).[14]

Thus, the first step in determining the enforceability of a non-solicitation covenant is to classify it as ancillary to employment or to the sale of a business. *White,* 303 S.E.2d at 749. As the Georgia Supreme Court has recognized, this classification is not obvious with some agreements. When the buyer of a business argues that a covenant was given ancillary to the sale of the business, and the seller argues that it was given ancillary to his employment, Georgia law requires that we analyze the bargaining capacity of the covenantor to determine whether he is more like an owner of the business or an employee. *Id.* at 751; *see also Swartz Invs.,* 556 S.E.2d at 463 (noting that employment agreements generally involve parties of unequal bargaining power). "If it appears that [the covenantor's] bargaining capacity was not significantly greater than that of a mere employee, then the covenant should be treated like a covenant ancillary to an employment contract." *White,* 303 S.E.2d at 751. Additionally, we can

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[14] As explained subsequently, Georgia courts treat separately covenants against the solicitation of employees.

consider the existence of any independent consideration given for the covenant because employment itself is generally the only consideration given for an employment related agreement. *Swartz Invs.*, 556 S.E.2d at 463.

In *White*, the Georgia Supreme Court addressed the validity of an agreement signed by a former senior vice-president of an advertising company when he sold his small minority interest in the business to his new employer. Through an employee stock plan, White had acquired 4.62% of the advertising company. He ranked fifth in size of holdings out of sixty-nine employees who owned stock. 303 S.E.2d at 747. When the advertising company was acquired by another company, White sold the shares to the buyer and, as required by the buyer as a condition of sale, executed a non-compete agreement. At that time, his stock was worth about $85,000. White was fired shortly after the acquisition. *Id.* at 748. The Georgia Supreme Court rejected the buyer's arguments that White's agreement was signed ancillary to the sale of the advertising company:

> It is clear that despite his ownership of a relatively small, interest in [the company] and his potential veto power over the merger, White had no control over overall management of [the advertising company], and in fact had so little bargaining clout within [the company] that he was unable to prevent his own termination. He was nothing more than an employee, albeit an important one, and as an employee White could reasonably have assumed that if he did not do as [the company] and [its buyer] wished he would be stigmatized as not being a team player, thereby jeopardizing his career prospects with [the company].

Id. at 750. In reaching this conclusion, the Georgia Supreme Court could rely on the fact that White exercised no control over the decision to pursue a merger and did not take part in merger negotiations, although he voted in favor of the merger.

Id. at 747. Additionally, White had testified that he had been told that "he should sign the agreements because they were necessary to guarantee his job and secure broader career opportunities for him." *Id.* at 748.

In *Drumheller* v. *Drumheller Bag & Supply, Inc.*, 204 Ga.App. 623, 626-27, 420 S.E.2d 331, 334-35 (1992), the Georgia Court of Appeals held that non-competition agreements executed in a stock sale by the three employees of a closely held textile company could be treated as ancillary to the sale of a business. The three employees owned between five and 13.5 percent of the company's shares. *Id.* at 333 n. 2. The stock sales agreement required the employees to sign the agreements. Additionally, they "executed employment contracts pursuant to the terms of the stock sales agreement, providing for their continued employment" with the buyer for three years. *Id.* at 333. In ruling that the agreements formed part of the consideration given for the stock deal, even though the employees became employed by the buyer, the Georgia Court of Appeals cited, among other things, the employees' representation by counsel during the sales negotiations, their awareness of the consequences of the sale, and the lack of evidence of unfair pressure to sell their stock from the buyer of the business and their future employer. *Id.* at 334-35.

As these cases demonstrate, the classification of an agreement as ancillary to employment or to the sale of a business depends on the particular factual circumstances of each case. *See generally Swartz Invs.*, 556 S.E.2d at 463-64 (discussing the factual inquiry required to classify an agreement). Here, MMC argues that drawing all factual inferences in favor of MMC, the non-movant, we cannot conclude that Meathe's status at J&H was more akin to an employee, as in *White*, rather than to the owner of a business, as in *Drumheller*. On the one hand, the record shows that Meathe was not specifically referenced in the 1997 Agreement, whereas other individuals at J&H were. Meathe was not included in the list of individuals that could impute knowledge to J&H in the transaction. Further, Meathe was not a director of J&H, and

the 1997 Agreement, not generic to all shareholders, distinguished directors. Finally, we know that the five-year solicitation term which began at the closing date had expired when Meathe took a job at P&C. Only the two-year term linked to Meathe's employment remains valid. As P&C and Meathe point out, the 1997 Agreement would no longer be in effect had Meathe not accepted employment at MMC.

On the other hand, we do not know whether Meathe had control over the decision to seek the merger between J&H and MMC. *See White,* 303 S.E.2d at 747. We do not know whether Meathe took part in the merger negotiations, voted in favor of a merger, or was represented by counsel. *See id.; Drumheller,* 420 S.E.2d at 334-35. We do not know whether Meathe signed the 1997 Agreement in order to guarantee his job, or whether the merger was conditioned on Meathe's signing it. *See White,* 303 S.E.2d at 748. Additionally, the pleadings do not explicitly show the type of employment held by Meathe at J&H, other than that he was not one of the company's directors. MMC alleges in its Amended Answer that Meathe was a "senior executive" at J&H. R2-25 at 11 ¶ 7. Meathe represents that he does not have sufficient information to confirm or deny this allegation. R2-27 at 3 ¶ 7.

P&C and Meathe concede that "[t]here is no question that the 1997 Stock Purchase Agreement is a stock purchase agreement and not an employment agreement," Brief of Appellees and Cross-Appellants, Palmer & Cay, Inc., and James B. Meathe at 8, but they also argue that it should be given strict scrutiny as an employment agreement because only the two-year non-solicitation term linked to the termination of Meathe's employment is still in effect. Although Meathe cites no cases for this argument, the Georgia Supreme Court has noted in dicta that a non-competition period that starts with the termination of employment "is customary in cases of non-competitive covenants ancillary to an employment contract." *See Ins. Ctr., Inc.* v. *Hamilton,* 218 Ga. 597, 602, 129 S.E.2d 801, 805 (1963). Nonetheless, we cannot grant judgment on the pleadings unless MMC "'can prove no set of facts' " which

would allow it to prevail. *Horsley*, 304 F.3d at 1131 (citation omitted). Given Georgia's focus on the covenantor's bargaining power at the time of the sale, the link between the start of the non-solicitation period and Meathe's termination of employment is alone insufficient to allow us to conclude, at the pleading stage, that the 1997 Agreement, entitled "Stock Purchase Agreement," is a contract ancillary to employment. Consequently, the district court erred in granting judgment on the pleadings in favor of P&C and Meathe.

C. *2002 Agreement*

MMC argues that the 2002 Agreement cannot at this stage be deemed ancillary to employment because facts relating to Meathe's bargaining power are not known. Unlike the 1997 Agreement, however, the 2002 Agreement did not arise contemporaneously with Meathe's sale of his interest in a business. Meathe signed the 2002 Agreement in order to gain rights to exercise MMC stock options, not to sell MMC stock. Thus, the district court correctly concluded that the 2002 Agreement is ancillary to employment. *See Redmond* v. *Royal Ford, Inc.*, 244 Ga. 711, 714, 261 S.E.2d 585, 588 (1979) (per curiam) (deeming ancillary to employment an agreement "not made by the seller in conjunction with the sale of a business," but "by the buyer in conjunction with the acquisition of an interest in a business").[15]

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[15] Citing dicta in *AGA, LLC* v. *Rubin*, 243 Ga.App. 772, 533 S.E.2d 804 (2000), *Saxton* v. *Coastal Dialysis & Medical Clinic, Inc.*, 220 Ga.App. 805, 470 S.E.2d 252 (1996), and a law review article, MMC argues that an employee's level of responsibility or management within a company determines the level of scrutiny to be applied to *any* non-competition or non-solicitation agreement he executes, and that we should not apply strict scrutiny to restrictive covenants binding a corporation's upper-level managers or shareholders. According to this argument, if we had sufficient facts to determine that Meathe exercised bargaining power with respect to the 2002 Agreement, we would apply lessened scrutiny even if it had no connection to the sale of a business. Because Georgia law, as enunciated by the Georgia Supreme Court, still instructs us to apply strict scrutiny to agreements ancillary to employment, *see White*, 303 S.E.2d at 749;

An agreement ancillary to employment will be upheld only if it is not unreasonable, is founded on valuable consideration, is reasonably necessary to protect the employer's interests, and does not unduly prejudice the public interest. *W.R. Grace & Co.* v. *Mouyal*, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992). Applying this standard, Georgia courts refuse to enforce employment non-competition agreements that prohibit the employee from accepting unsolicited business from former clients after leaving employment. *Waldeck* v. *Curtis 1000, Inc.*, 261 Ga.App. 590, 592, 583 S.E.2d 266, 268 (2003) (citing *Singer* v. *Habif, Arogeti & Wynne, P.C.*, 250 Ga. 376, 377, 297 S.E.2d 473, 475 (1982)).

In this case, the 2002 Agreement contains a provision that prevents Meathe from accepting unsolicited business from former clients of Marsh. Under *Singer*, 297 S.E.2d at 475 and *Waldeck*, 583 S.E.2d at 268, this provision is invalid under Georgia law. Since it cannot be blue-penciled, the 2002 Agreement is thus unenforceable in Georgia.

MMC argues that the district court erred in concluding that, given Meathe's potentially high bargaining capacity and senior position at Marsh, MMC's attempts to conform the 2002 agreement to Georgia law by promising not to enforce certain provisions makes it enforceable under Georgia law. Although no case precedent in Georgia addresses employers' self-reformation of invalid restrictive covenants, the policies underlying Georgia's refusal to blue-pencil over-broad employment contracts apply equally to employers' attempts to do so on their own. As the district court notes, if employers were allowed to blue-pencil their agreements, they "could load up [non-competition agreements] with oppressively overreaching terms and intimidate all but the litigation-hardy employees, then post-hoc excise offending provisions to avoid requested judicial invalidation." *Palmer & Cay, Inc.* v. *Marsh and McLennan Cos.*, No. 403CV094 at 11. This con-

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Redmond, 261 S.E.2d at 588, we decline to extend Georgia law to apply intermediate or lessened scrutiny to the 2002 Agreement.

clusion does not rest on the assumption that MMC originally drafted the agreement to oppress Meathe. Rather, Georgia's refusal to blue-pencil employment contracts applies regardless of an individual employer's motivations in fashioning a non-competition agreement. *See White,* 303 S.E.2d at 750 (declining to address whether employer "in fact took advantage of their dominant bargaining power to extract [the employee's] promises" when refusing to blue-pencil a restrictive covenant). Thus, MMC's attempt to excise the overly broad portions does not make the 2002 Agreement enforceable in Georgia.

D. *Proper Scope of the Declaratory Judgment and Injunction*

On cross-appeal, Meathe and P&C argue that the district court erred in failing to consider whether to issue a declaratory judgment and enjoin enforcement of the 1997 and 2002 Agreements outside of Georgia. First, they contend that the Full Faith and Credit Clause applies to the district court's judgment and prohibits a court from curtailing the extraterritorial effect of its judgment. Second, they argue that our decision in *Keener* v. *Convergys Corp.,* 342 F.3d 1264 (11th Cir.2003), the case which the district court cited in limiting its declaratory judgment and injunction to Georgia, applies only to injunctions and does not govern the district court's declaratory judgment.[16] In response, MMC contends that the Full

[16] Meathe and P&C also argue that a recent Georgia Court of Appeals case, *Hostetler* v. *Answerthink, Inc.,* 267 Ga.App. 325, 599 S.E.2d 271 (2004), overrules the panel's decision in *Keener.* However, we are bound by the panel's decision in *Keener* unless and until it is overruled by intervening, on-point case law from our circuit sitting *en banc,* the Supreme Court, or, on matters of Georgia state law, the Georgia Supreme Court. *See United States* v. *Chubbuck,* 252 F.3d 1300, 1305 n. 7 (11th Cir.2001). Not only is *Hostetler* not a decision of the Georgia Supreme Court, *Keener*'s discussion of the district court's injunction was based on the federal law governing injunctive relief, *see Keener,* 342 F.3d at 1269 (citing *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.,* 97 F.3d 492, 496 (11th Cir.1996); *Newman* v. *Alabama,* 683 F.2d 1312, 1319 (11th Cir.1982)). As such, we are bound by the decision in *Keener.*

Faith and Credit clause does not require the district court to impose Georgia's public policy on other states, and that *Keener* applies here to forbid a declaratory judgment which has effect throughout the nation.[17]

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[17] On 11 May 2004, Meathe and P&C moved the district court to hold MMC in civil contempt for violating the district court's injunction. They alleged that MMC sought to enforce the 1997 and 2002 Agreements against Meathe in a pending action in Michigan state court and that Meathe had been served with a copy of the Complaint and Summons at his office in Atlanta, Georgia, by an authorized process server acting under the laws of Georgia.

On appeal, MMC argues that Meathe and P&C contended in that motion that the district court's injunction was not limited to Georgia, a position inconsistent with the position they take on appeal. As such, MMC argues that we should apply judicial estoppel to dismiss their cross-appeal. In response, P&C and Meathe argue that they have not taken inconsistent positions under oath in a prior proceeding, and that judicial estoppel does not apply.

Under judicial estoppel, an equitable doctrine, a party is prevented from "'asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'" *Burnes* v. *Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir.2002) (citation omitted). We consider two main factors in determining whether to apply the doctrine. First, the allegedly inconsistent positions must have been taken "'under oath in a prior proceeding,' " and second, they must have been "'calculated to make a mockery of the judicial system.'" *Id.* (citation omitted). These factors are not exhaustive, however, and we take into account all of the circumstances of each case in making our determination. *Id.* at 1286. Other pertinent factors include whether the present position is "'clearly inconsistent' with the earlier position" and whether the party successfully persuaded a court to accept the earlier position, "so that judicial acceptance of the inconsistent position in a later proceeding creates the perception that either court was misled." *Id.* at 1285 (citation omitted).

In this case, we decline to exercise our discretion to apply judicial estoppel to Meathe and P&C's cross-appeal. First, we believe that their positions were not clearly inconsistent. Meathe and P&C concluded the background section of their supporting brief for their motion by arguing that "[s]ervice of the Summons on Meathe in Georgia by Georgia judicial officers is a clear violation of the November 11 Order." PLAINTIFFS' BRIEF IN SUPPORT OF ITS MOTION TO SHOW CAUSE at 2. Although, as MMC explains on appeal, Meathe and P&C argue in one paragraph in the brief that the order could be interpreted to enjoin conduct with a "nexus" to Georgia despite its extraterritorial effect, and, in that paragraph, they contend that "MMC was not warranted in assuming that

Although we review *de novo* a district court's legal conclusions underlying a decision to grant injunctive relief, *Major League Baseball* v. *Crist*, 331 F.3d 1177, 1183 (11th Cir.2003), we review the scope of the district court's injunction for abuse of discretion, *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 496 (11th Cir.1996). As we explained previously, our review of the district court's grant of judgment on the pleadings is *de novo*. *See Horsley*, 304 F.3d at 1131.

In *Keener*, we held that a district court abused its discretion by enjoining the enforcement of an agreement nationwide, when the agreement, invalid under Georgia law and public policy, had selected another state's law. *See* 342 F.3d at 1270. The plaintiff, Keener, had been employed by an Ohio corporation. He worked in Illinois and Ohio, and he signed an agreement which designated Ohio law as its governing law. Keener then accepted a job at a competitor located in Georgia. He brought an action in federal district court in Georgia and sought declaratory and injunctive relief as to the validity and enforceability of the agreement. *See Keener* v. *Convergys Corp.*, 312 F.3d 1236, 1238-39 (11th Cir.2002).

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the injunction allowed it to file suits in other states ... especially ... given the long-standing power of courts to enjoin conduct outside the borders of its jurisdiction," *id.* at 4, they clarified in their reply brief that their motion was "based on Defendant's service of process on Meathe *in Georgia* by the use of an official appointed by the Fulton County Superior Court to serve process in Fulton County, Georgia; pursuant to Georgia law," PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO SHOW CAUSE at 1. As such, we believe that the thrust of Meathe and P&C's argument concerned the service of process on Meathe in Georgia. This position is not inconsistent with their position on cross appeal, that the district court issued an injunction that was limited to Georgia. Moreover, if Meathe and P&C did attempt to convince the district court that its injunction did not extend to other states, they did not succeed. In ruling on the motion, the district court clarified that it intended "to restrain MMC from bringing any further court actions *in Georgia* to enforce its [non-competition agreements] against Meathe" and that it did not intend "to restrain it from enforcement actions elsewhere." *Palmer & Cay, Inc.* v. *Marsh & McLennan Cos.*, No. 403CV094 at 2, 2004 WL 2881888 (S.D.Ga. June 7, 2004) (order denying contempt motion).

On appeal, we answered two relevant questions: first, whether the agreement was unenforceable under Georgia law, and, second, whether the district court abused its discretion in permanently enjoining the enforcement of the agreement worldwide. *Keener,* 342 F.3d at 1267. In answering the first question, we applied the law as certified by the Supreme Court of Georgia, and we held that the district court had properly granted summary judgment declaring the agreement unenforceable under Georgia law. *Id.* at 1268-69. In answering the second, we held that the district court should have limited the injunction to Georgia. *Id.* at 1270. *Keener* thus contained two holdings. The first addressed the propriety of summary judgment. The second concerned the scope of the injunction.

In *Keener,* we did not specifically address the geographic scope of the district court's declaratory judgment. As Meathe and P&C point out, however, we noted that "Georgia cannot in effect apply its public policy decisions nationwide-the public policy of Georgia is not that everywhere," *id.* at 1269, and we stated that "[t]he agreement is unenforceable under Georgia law, in Georgia," *id.* at 1270. Taken out of context, these quotes seem to indicate that *Keener* applies to declaratory judgments as well. Viewed in context, however, they do not. They refer to Georgia's power to enforce nationwide, by way of a nationwide injunction, its public policy interests. *Cf. Klay* v. *United Healthgroup, Inc.,* 376 F.3d 1092, 1103 n. 15 (11th Cir.2004) (considering quote from prior case, in light of, *inter alia,* the factual context of the case and the precedents cited). *Keener* controls the injunction issued by the district court, but not its declaratory judgment. As such, the district court did not err in citing *Keener* to limit the scope of the injunctive relief to Georgia.

We next determine whether the district court erred in restricting the scope of its declaratory judgment to Georgia. Few cases address the geographical scope of a judgment from the perspective of the rendering forum. In most instances, courts address the reach of a judgment when asked to recog-

nize or enforce a judgment issued by another court. They apply the doctrines of claim and issue preclusion to determine indirectly the scope of the prior judgment. *See, e.g., Baker* v. *General Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 663- 64, 139 L.Ed.2d 580 (1998).

Although these cases address the problem from the perspective of the enforcing court, they stand for several general principles which inform our disposition of P&C and Meathe's cross-appeal. Under the Full Faith and Credit Clause of the United States Constitution[18] and its implementing statute, 28 U.S.C. § 1738,[19] which apply to judgments rendered by state courts,

> [a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force.

Id., 118 S.Ct. at 663-664 (footnote omitted). This rule applies even if the rendering state's judgment is based on public policy offensive to the enforcing state. *Id.*, 118 S.Ct. at 664. Conversely, since enforcing states ultimately decide the scope

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[18] The Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

[19] Title 28 U.S.C. § 1738 provides in relevant part:

> The records and judicial proceedings of any court of any ... State, Territory or Possession ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken

of its judgment, a rendering state can "determine the extraterritorial effect of its judgement ... only ... indirectly by prescribing the effect of its judgments within the State." *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 270, 100 S.Ct. 2647, 2655, 65 L.Ed.2d 757 (1980). "To vest the power of determining the extraterritorial effect of a State's own ... judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Id.* at 272, 100 S.Ct. at 2656.

In contrast, federal common law determines the scope of judgments rendered by federal courts sitting in diversity.[20] Under federal common law, an enforcing court should apply the law of the state courts in the state where the rendering federal court sits, unless the state's law conflicts with federal interests. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 509, 121 S.Ct. 1021, 1028, 149 L.Ed.2d 32 (2000). This rule, according to the Supreme Court in *Semtek International Inc.*, achieves the aims of *Erie* by discouraging forum shopping and encouraging a uniform administration of law. *Id.* at 508-09, 121 S.Ct. at 1028.

In determining the applicable federal common law in this case, we conclude that the goals underlying *Semtek* apply. Georgia does not attempt to limit its declaratory judgments in cases involving non-competition agreements. *See Hostetler* v. *Answerthink*, 267 Ga.App. 325, 599 S.E.2d 271, 275 (2004) (noting that under Georgia law of claim and issue preclusion, a final declaratory judgment with respect to a non-

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[20] Contrary to both parties' arguments, neither the Full Faith and Credit Clause nor its implementing statute applies to judgments issued by federal courts. "By their terms they govern the effects to be given only to state-court judgments (and, in the case of the statute, to judgments by courts of territories and possessions). And no other federal textual provision, neither of the Constitution nor of any statute, addresses the claim-preclusive effect of a judgment in a federal diversity action." *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 506-07, 121 S.Ct. 1021, 1027, 149 L.Ed.2d 32 (2001).

competition agreement precludes subsequent claims or issues from being relitigated in other states); *cf. Gunby* v. *Simon*, 277 Ga. 698, 594 S.E.2d 342, 343 (2004) (addressing Georgia law of claim preclusion generally); *Shields* v. *Bellsouth Adver. & Publ'g Corp.*, 273 Ga. 774, 545 S.E.2d 898, 900-01 (2001) (addressing Georgia law of issue preclusion generally). A federal district court sitting in Georgia and applying Georgia law should not do so either. This result comports with the aims of *Erie* and the principles of the Full Faith and Credit Clause. As such, we vacate the district court's declaratory judgment to the extent it attempted to limit relief to Georgia.

III. CONCLUSION

This appeal concerns two employee and client non-solicitation agreements entered into between Meathe and MMC. The district court determined that these agreements were unenforceable in Georgia and granted judgment on the pleadings in favor of Meathe and P&C, his current employer. First, because material issues of facts remain regarding Meathe's bargaining power in the merger negotiations between J&H and MMC, we conclude that the district court erred in granting judgment on the pleadings in favor of P&C and Meathe on their claim that the 1997 Agreement is unenforceable under Georgia public policy. Second, we determine that the district court did not err in ruling that the 2002 Agreement is unenforceable under Georgia law. Finally, we decide that the district court correctly applied *Keener* to limit its injunction to Georgia but erred in limiting its declaratory relief to Georgia. Accordingly, we AFFIRM in part, VACATE in part, and REMAND for proceedings consistent with this opinion.

Filed
U.S. Court of Appeals
ELEVENTH CIRCUIT
April 1, 2005
Thomas K. Kahn, Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case Number: 03-16248-HH

Palmer & Cay, Inc., a Georgia Corporation,	Plaintiff- Appellee Cross-Appellant,
James B. Meathe,	Plaintiff- Counter-Defendant- Appellee Cross-Appellant,

versus

Marsh & McLennan Companies, Inc., a Delaware Corporation	Defendant- Counter-Claimant- Appellant Cross-Appellee.

On Appeal from the United States District Court for the
Southern District of Georgia

Before: BIRCH, BARKETT and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/illegible
UNITED STATES CIRCUIT JUDGE

Filed U.S. Court of Appeals
Eleventh Circuit
May 31, 2005
Thomas K. Kahn
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA,
SAVANNAH DIVISION

Case No. 403CV094

PALMER & CAY, INC., and JAMES B. MEATHE,
Plaintiffs/Counter-Defendants,

v.

MARSH & McLENNAN COMPANIES, INC.,
Plaintiffs/Counter-Defendants.

ORDER

I. INTRODUCTION

Insisting that the restrictive covenants he signed with his former employer (defendant Marsh & McClennan [sic] Companies, Inc. (MMC)) are unenforceable, plaintiff James B. Meathe and his current employer, Palmer & Cay, Inc. (P & C), seek a judgment enjoining MMC from enforcing them. Doc. #4.

MMC counterclaims for injunctive relief, damages and restitution arising from Meathe's breach of his fiduciary duty, breach of the same restrictive covenants, and violation of the Georgia Trade Secrets Act. Doc. #25 at 10-19, 20-21. It also raises tortious interference with contract and business relations claims against P & C. *Id.* at 19-20, 21-22. Plaintiffs move for Judgment On The Pleadings (JOP). Doc. #17.

II. F.R.CIV.P. 12(c) STANDARDS

JOP "is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Riccard* v. *Prudential Ins. Co.*, 307 F.3d 1277, 1291 (11th Cir.2002) (quotes and cite omitted).

The Court thus "accept[s] the facts in the [C]omplaint as

true and view[s] them in the light most favorable to the nonmoving party." *Horsley* v. *Feldt,* 304 F.3d 1125, 1131 (11th Cir.2002) (quotes and cites omitted). "Unlike the motion to dismiss for failure to state a claim, the [JOP] motion ... considers not only the information on the face of the complaint but also the content of any other pleadings such as the answer and any affirmative defenses or counterclaims." 11 Moore's Fed. Prac. §56.30[5] at 56-229 (2003).

Courts also may consider documents attached to a Complaint, an Answer, and a Motion to Dismiss-without converting the JOP motion into one for summary judgment-only if the attached documents are: central to one of the claims and undisputed (*i.e.,* that the documents' authenticity is not challenged). *Horsley,* 304 F.3d at 1134-35.[1]

III. BACKGROUND

Prior to 3/97, Meathe was a senior executive and shareholder of Johnson & Higgins (J&H), a large, privately held nationwide insurance brokerage firm. Doc. #25 at 11 (Counterclaim) ¶7. That Spring, MMC purchased all of J&H's stock and J&H was merged into MMC. *Id.* ¶8. At that time, Meathe held 185 (hence, 1/3 of 1%) of J&H's 54,965 shares. Doc. #17 at 13.[2]

The resulting MMC-J&H Stock Purchase Agreement accorded Meathe a $2,921,699 cash payment and 25,716 shares of MMC stock valued by MMC at $10,641,347. *Id.*

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[1] For that matter, the Court discerns no dispute over the material facts in this case-only the way each side characterizes them.

[2] To support this assertion, plaintiffs attach to their brief a copy of the Stock Purchase Agreement and thus cite to matters outside the record. Doc. #17 "Appendix A." But *Horsley* only authorizes consideration of matters attached to *pleadings* and arguably the JOP motion itself, *not* briefs. 304 F.3d at 1134-35. Nevertheless, MMC does not dispute the assertion, much less challenge plaintiff's inclusion of this document into the record, either on procedural or authenticity grounds. Doc. #19 at 8. The "procedural drift," then, is legally inconsequential here.

¶9; *but see* doc. #22 at 5 n. 3 (Meathe says he was paid only $3,385,884 in cash/stock at closing and that MMC has inflated that number by citing a later sale of the stock, with its value inflated by a rising market).

In exchange for that consideration, Meathe, MMC says, agreed to be bound by MMC-J&H non-competition agreements (NCAs). He promised, *inter alia,* that, in the event of his departure, he would

> not (x) solicit, accept or service business that competes with businesses conducted by the Company [J&H], Buyer [MMC], or any of their Subsidiaries (i) from any clients or prospects of [J&H] or its affiliates who were solicited directly by [Meathe] or where [Meathe] supervised, directly or indirectly, in whole or in part, the solicitation activities related to such clients or prospects or (ii) from any former client who was such within two (2) years prior to such termination and who was solicited directly by [Meathe] or where [Meathe] supervised, directly or indirectly, in whole or in part, the solicitation activities related to such former client; or (y) solicit an employee of the Company or its affiliates to terminate his employment.

Doc. #4 ¶12; doc. #17 App. A at 70 §6.13(b).

"The Non-Solicit Period" contained in that clause was to "commence on the Closing Date and end on the later of the fifth anniversary of the Closing Date and the second anniversary of the date on which [Meathe] is no longer employed by [J&H], [MMC] or any of their respective Subsidiaries." *Id.*

The 1997 Agreement expressly represents that it is between J&H, "the stockholders of the Company listed on Annex A hereto (each such stockholder, a *"Seller"*) and [MMC] ... (*"Buyer"*). Doc. #17 App. A at 7. The signature page of the Agreement reflects "The Persons Listed on Annex A, As

Sellers," but "Annex A" is not part of the "Stock Purchase Agreement" that plaintiffs have submitted. Yet, the parties' briefs and oral argument reflect no dispute that Meathe sold his stock to MMC as part of that Agreement.

The (1997) agreement contained a forum-selection clause under the which the parties agreed to

> submit to the jurisdiction of the courts of the State of New York and the Federal courts ... located in [Manhattan, NYC] solely in respect of the interpretation and enforcement of the provisions of this Agreement. . . .

Doc. #4 exh. A.

After the sale, MMC employed Meathe from 1997-2003. Doc. #4 ¶2; doc. #25 at 13 ¶13. Meathe left MMC's employ on 1/1/03, but signed, in addition to a post-employment agreement not at issue here, doc. #25 at 13 ¶13, a 12/27/02 agreement (the "2002 Agreement") promising

> for a period of two (2) years from the date of termination [1/1/03, not to] directly or indirectly, as a[n] ... officer or director of a corporation, or as an employee ... except of the Company [MMC]:
>
> (a) solicit or accept business of the type offered by [MMC] during term of employment with [MMC] or perform or supervise....
>
> (b) solicit any [MMC] employee ... who reported to [Meathe] directly [or] indirectly to terminate his employment with [MMC] for the purpose of competing with [MMC].

Doc. #25 at 12 ¶11. There is no dispute that Meathe is subject to the 1997 and 2002 Agreements' two-year NCAs that together expire on 1/1/05. Doc. #17 at 14; #19 at 6; #22 at 3, 8. As part of the 2002 Agreement, Meathe also recognized and acknowledged MMC's trade secrets and confidential proprietary information. Doc. #25 at 12-13 ¶11. He thus

promised that he would not disclose or use same. *Id.*

As consideration for the 2002 Agreement, MMC granted Meathe stock options which he exercised for a $252,678.30 profit. MMC also paid him $720,000 salary/bonus in his final year of employment. Doc. #25 at 13 ¶¶12-13.

At the time of his termination, Meathe was a Managing Director and Head of the Midwest Region for Marsh USA, Inc. (Marsh), an MMC subsidiary. *Id.* His duties in that position included the solicitation and servicing of clients for Marsh in its Midwest Region, formulation of business strategy and marketing plans, management of Marsh's finances in the Midwest Region, and the formulation of business policies and procedures. *Id.* ¶14.

He thus had been given privileged access by MMC to MMC's (and Marsh's) confidential information relating to the servicing of its clients (*e.g.,* Marsh's client lists, client insurance policy renewal dates, revenues, profit margins, marketing strategies and techniques, operating financial information), all of which, MCC claims, accords Marsh a competitive advantage in the marketplace. *Id.* ¶15.

In 2/03, Meathe became President of P & C, a direct MMC competitor. *Id.* ¶16. Somewhere around that time (Meathe doesn't explicitly say when) he moved to Georgia. *Id.* ¶17. MMC believes, however, that since Meathe resigned from MMC, he has directly and indirectly induced Marsh employees to resign from Marsh and join P & C, including 62 who left from 3/03-4/03. *Id.* ¶18. Meathe, MMC believes, continues to do so at present, *id.,* and is also soliciting Marsh clients in violation of the above-excerpted, restrictive covenant. *Id.* ¶20.

Meathe is doing all this, says MMC, to help P & C expand its business operations in Chicago and the Midwest region. *Id.* ¶21. MMC thus accuses Meathe of using and disclosing, without authorization, MMC/Marsh confidential business information and trade secrets in the process. *Id.* It contends that the two, above-excerpted agreements prohibit Meathe

from soliciting a defined and limited group of Marsh clients and employees until 1/1/05. Doc. #19 at 6.

MMC nevertheless informed Meathe by letter, however, that, to conform with Georgia law, it would not seek to enforce the 12/27/02 contract term prohibiting him from "accepting business" from those unsolicited clients who unilaterally choose to take their business to P & C. Doc. #19 at 5 & exh. A.

MMC's counterclaim also targets P & C. While aware of Meathe's restrictive-covenant breaches, P & C has encouraged his "serial breaches of those contracts." Doc. #25 (Counterclaim) ¶24. MMC insists that, given the very senior position Meathe held at MMC, and the MMC-information access that he enjoyed, it will be virtually impossible for Meathe to perform his job as P & C's President without using and disclosing the confidential information and trade secrets that he gained while in MMC's employ. *Id.* ¶25.

Meathe and P & C brought this action on 5/21/03, doc. #1, as amended, doc. #4. Both sides, then, want their rights and responsibilities judicially resolved, declared and enforced.

IV. ANALYSIS

A. Venue/Choice of Law

As a preliminary matter, the parties have waived any "New York," contractually forum-selected, venue rights they might hold. Plaintiffs did so by filing its case here; MMC did so by Answering, Counterclaiming and litigating the merits without challenging venue. Doc. #8 at 11 ¶6; doc. #19; 5A Wright & Miller: Fed. Prac. & Proc. Civ.2d §1391 (Supp.2003) ("a party can be held to have waived a Rule 12(h)(1) defense through conduct, such as extensive participation in the litigation of the merits, even if the literal requirements of Rule 12(h)(1) have been met").

Plaintiffs argue, however, that Georgia law controls. Doc. #17 at 8-9. MMC responds that both Georgia and New York law support judgment in its favor. Doc. #19 at 2, 6-7. As will

be more fully discussed below, this Court must first apply Georgia law[3] to determine if enforcement of a restrictive covenant offends the state's public policy. Only then may New York law be considered. In effect, then, Georgia law controls irrespective of what law the parties contractually selected.

B. Restrictive Covenants

In recently holding that an *employment*-based (as opposed to *sale-of-business* based) NCA was unenforceable under Georgia law, this Court noted that the result

> present[ed] an unfortunate clash between the core values enshrined in fundamental contract law versus judicial and legislative choices governing the free flow of commerce. Restrictive covenants have been around for ages. They offer intellectual property owners protection against theft and dilution by others. They encourage investment and expand business opportunities. Society is served by the expansion of commerce and the prosperity it brings.
>
> [The ex-employee/plaintiff in that case] admit[ed that] he became privy to confidential information. But a fair reading of recent Georgia appellate decisions [led this Court to conclude] that employers within and without this State are, in many respects, powerless to protect business secrets.

Keener v. *Convergys Corp.*, 205 F.Supp.2d 1374, 1383 (S.D.Ga.2002) (footnote omitted) (*Keener I*), *conflict-of-law question certified*, 312 F.3d 1236 (11th Cir.2002), *answered*, *Convergys Corp.* v. *Keener*, 276 Ga. 808, 582 S.E.2d 84, (2003), *answer conformed*, *Keener* v. *Convergys Corp.*, 342

[3] In that this is a diversity case, the Court must apply "the law of the forum in which it sits." *Continental Cas. Co.* v. *Adamo*, 326 F.3d 1181, 1182 (11th Cir.2003) (quotes and cite omitted).

F.3d 1264 (11th Cir.2003) (*Keener II*) (holding: (1) because Georgia public policy was offended by NCA, Georgia law applied to render it unenforceable; (2) it was not an abuse of discretion to enjoin enforcement of NCA in Georgia while employee remained resident of that state; (3) injunction permanently enjoining enforcement of NCA worldwide was overbroad so it must be modified to preclude enforcement of NCA in Georgia only; and (4) counterclaim for restitution should not have been dismissed as abandoned, so remand for further proceedings thereon was warranted).

Once again, then, this Court is plunged into the "unfortunate clash" of interests where, irrespective of the parties' choice-of-law selection, Georgia's law must nevertheless be applied first to determine whether enforcement will violate its public policy-a policy that, in the employment-NCA context, "is hostile toward any limitations on competition." *Keener II,* 342 F.3d at 1269.[4]

As in *Keener,* this case involves another "restrictee" who has, after entering into an elaborate set of promises, moved to Georgia and now seeks to shed them. But MMC distinguishes *Keener* by claiming that Meathe is an ex-shareholder and senior executive. Hence, he is more an *owner* than an employee, and his post-sale employment with Marsh was only "ancillary," MMC contends. So, MMC concludes, more favorable (to MMC) Georgia law applies. Doc. #19 at 6-14.

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[4] In fact,

> Georgia's free-competition policy is embedded within its constitution and statutes. Recent Georgia cases ... continue to vigorously apply [the public policy protections embodied in *Nasco, Inc.* v. *Gimbert,* 239 Ga. 675, 676, 238 S.E.2d 368 (1977)] to invalidate NCAs.... This may wind up encouraging non-Georgia employees to "flee to Georgia" to shed their NCAs. The aches and pains of federalism (pro-marriage advocates in some States have decried other States' "quickie-divorce" laws), however, have long formed part of the American legal fabric.

Keener I, 205 F.Supp.2d at 1379. At 10/27/03 oral argument, MMC conceded that Georgia public policy (hence, Georgia law) must be satisfied "as a threshold matter."

Meathe argues otherwise, citing his 1/3 of 1% stock ownership and non-controlling party (hence, low-bargaining power) status at the time of the 1997 agreement, and "mere employee" status when he signed the 12/27/02 agreement. Doc.17, 22.

MMC relies on cases like *West Coast Cambridge, Inc.* v. *Rice*, 262 Ga.App. 106, 584 S.E.2d 696 (2003), doc. #19 at 7, which illuminates different tiers of judicial scrutiny in light of the varying levels of bargaining power existing between different types of parties (*e.g.*, a business owner/seller who signs an NCA will have more bargaining power than a mere employee, so courts employ less scrutiny of the NCA, and thus are less apt to protect him):

> Restrictive covenants *ancillary to the sale of a business* traditionally have been afforded a substantial degree of protection by the Georgia courts and are viewed with the least degree of scrutiny. Conversely, covenants not to compete which are *part of an employment contract* receive close scrutiny to ensure that they are strictly limited in duration, territory, and prohibited activities. In between these two standards of review is the "middle level of scrutiny," which is generally applied to restrictive covenants ancillary to professional partnership agreements.

262 Ga.App. at 108, 584 S.E.2d 696 (emphasis added); Georgia Contracts: Law and Litigation §8-3 *Covenants-level of scrutiny* (2002); Termination of Employment §13:42 (*RESTRICTIVE COVENANTS*) (2003).

MMC points to the substantial difference (between sale-of-business and employment-contract-based NCAs) in judicial protection in arguing that the Agreements *sub judice* falls into the sale-of-business, rather "mere-employee" judicial category. It thus invokes cases like *White* v. *Fletcher/Mayo/Assoc.*, 251 Ga. 203, 205, 303 S.E.2d 746 (1983) (If covenant not to compete has been made by seller

ancillary to sale of business, seller may be enjoined from competing to extent that it is found essential, by clear and convincing evidence, to protect purchaser, *despite* overbreadth of covenant) *and Hicks* v. *Doors By Mike, Inc.*, 260 Ga.App. 407, 410, 579 S.E.2d 833 (2003) (Duration restriction of non-competition agreement prohibiting seller of gutter service from competition and solicitation for 5 years within a 50-mile radius of city where gutter service was located was reasonable), cited in 17 Ga. Jur. Employment and Labor §8:35 (*Acceptable Limitation*) (2003).

Meathe, in contrast, cites to cases like *Waldeck* v. *Curtis 1000, Inc.*, 261 Ga.App. 590, 591, 583 S.E.2d 266 (2003) (A restrictive covenant in an *employment* agreement is in partial restraint of trade and will be enforced only if the restraint imposed is reasonable, is founded on a valuable consideration, is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public) *and White*, 251 Ga. at 204, 303 S.E.2d 746 (If an ancillary to an *employment* contract NCA, as read in its entirety, is unenforceable, then it cannot be judicially rewritten so as to sever objectionable portion).

These cases show that employment-contract NCA's will often be invalidated (under the "strict scrutiny" standard), while sale-of-business generated NCAs can be upheld *despite* overbreath or other flaws. And, courts may blue-pencil[5] the latter, but not the former. *See Hudgins* v. *Amerimax Fabricated Prods., Inc.*, 250 Ga.App. 283, 285, 551 S.E.2d 393 (2001) (While a covenant not to compete that is part of the sale of a business interest can be blue-penciled to sever an unreasonable or an overbroad provision, a similar restrictive covenant that is part of an employment contract cannot be rewritten).

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[5] "This term is broadly applied in Georgia to include judicial editing of covenants which were not written in such a way that they are divisible by simply excising certain parts or words from them." *White*, 251 Ga. at 204 n. 1.

The "no-blue-penciling" doctrine means that one flawed employment-contract NCA provision can unravel the entire NCA. *See, e.g., Waldeck* 261 Ga.App. at 593, 583 S.E.2d 266 (because "blue pencil" doctrine of severability did not apply, determination that non-solicitation clause in employment agreement preventing former employee from accepting business from unsolicited former clients of employer was unenforceable made all other non-solicitation clauses included in agreement likewise unenforceable).[6]

Georgia law in this area gets more complicated when closely held, small business owners, professional (doctors, dentists, surgeons, etc.) partnerships and entities where owners who exercise some degree of control over the entity being sold in fact sell their business, partnership, (etc.) and enter both sale-of-business *and/or* employment-based NCA's.

In such cases, somewhat subtle distinctions are made. *See New Atlanta Ear, Nose, and Throat Associates, P.C.* v. *Pratt,* 253 Ga.App. 681, 683-84, 560 S.E.2d 268 (2002) (Level of scrutiny that applied to review of restrictive covenants in physicians' *employment* agreements was strict scrutiny, though physicians and their employer also entered into *shareholder* agreements containing restrictive covenant, given that physicians were not shareholders of their employer's medical group at time they entered into the employment agreements, having received no stock until the closing two months later, and the employment agreements all specified that their restrictive covenants "shall be deemed, and shall be construed as separate and independent agreements," while the restrictive covenant in the shareholder agreement indicated that it was in addition to the employment restrictive covenants in that it in no way relieved the shareholders of those separate employment obligations).

Complications likewise arise when companies sell outright (or otherwise exercise some asset-transfer package within a

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[6]Evidently in recognition of this, MMC sought to "self-blue-pencil" the 2002 NCA. *See* doc. #19 at 14-15.

merger) and their high-level executives contemporaneously sign up to NCA's, thus injecting both sale-of-business *and* employment-based NCA doctrines into the mix.

Courts must resolve additional complications that arise when different kinds of agreements are *non-contemporaneously* entered. Doctrines, rules of construction, etc., get blended. *See Lyle* v. *Memar*, 259 Ga. 209, 210, 378 S.E.2d 465 (1989) (If a contract for the sale of a business and an employment contract, neither of which contains an enforceable restrictive covenant standing alone, are part of same transaction, they may be construed together to supply missing elements and "blue penciled" to make overbroad terms valid; however, if the "two contracts [are] neither contemporaneous nor between the same parties, it [is] error for the court to construe them together. We do not reach the question whether we would construe a contemporaneous employment agreement with the sales contract"[7]); *see also*

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[7] In contrast, the *Pratt* court did construe contemporaneously entered sales and employment agreements:

> Subjecting two restrictive covenants to *different* treatment, even though found in agreements executed as part of the *same* transaction, is consistent with the rationale behind the different levels of scrutiny.... [N]on-compete covenants found in sale of business or partnership agreements are generally afforded greater degrees of latitude. If the business seller or potential partner as a part of the transaction also enters into a separate employment agreement with its own additional non-compete covenant, then the consideration received for that covenant is usually less (generally employment benefits such as salary and insurance coverage), subjecting it to a *stricter level* of scrutiny. The context and consideration of the two restrictive covenants being different, they are subject to different levels of scrutiny."

Pratt, 253 Ga.App. at 684 (emphasis added). The *Pratt* court went on to note that in that case there were

> "the following additional factors differentiating the restrictive covenants in the employment contracts from those in the share holder agreement: (i) at the time they entered into the employment agreements, the defendants were not shareholders of the new or former medical group, as they received no stock until the closing two months later; (ii) the

S.E. Harbour, *Restrictions on Post-employment Competition by an Executive under Georgia Law,* 54 Mercer L.Rev. 1133, 1190 (2003) (If the multiple agreements can be said to form a "unitary contractual scheme," then one has an argument that a flawed clause in one invalidates the others); *id.* at 1188, 378 S.E.2d 465 (quoting *A.L. Williams & Assoc.* v. *Stelk,* 960 F.2d 942 (11th Cir.1992)).

On top of all that, some courts are creating distinctions (scrutiny-wise) between NCA's that (a) do and do not contain non-*solicitation* (as opposed to non-*competition*) agreements, *see Abbott-Interfast Corp.* v. *Harkabus,* 250 Ill.App.3d 13, 189 Ill.Dec. 288, 619 N.E.2d 1337, 1341 (Ill.App. 2 Dist.1993) (NCA which restricts specific activity, such as soliciting particular clients, is subject to lower degree of scrutiny than agreement which prohibits former employee from engaging in any type of competition with employer); or (b) are based on how narrowly the NCA defines the protected class of customers. *W.R. Grace & Co., Dearborn Div.* v. *Mouyal,* 262 Ga. 464, 467, 422 S.E.2d 529 (1992) ("As the group which the employer wishes to protect from solicitation by former employees becomes more narrowly defined, the need for a territorial restriction expressed in geographic terms becomes less important").

Other cases apply strict scrutiny to an NCA, even assuming that the parties have equal bargaining power, where no consideration can be shown to support it. *See Swartz Inv., LLC* v. *Vion Pharmaceuticals, Inc.,* 252 Ga.App. 365, 370, 556 S.E.2d 460 (2001) , cited in S.E. Harbour, 54 Mercer L.Rev. at 1173-76, 1197 (collecting and criticizing "no-

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employment agreements all specified that their restrictive covenants "shall be deemed, and shall be construed as separate and independent agreements"; and (iii) the restrictive covenant in the shareholder agreement indicated that it was in addition to the employment restrictive covenants in that it in no way relieved the shareholders of those separate employment obligations. Accordingly, we review the employment restrictive covenants under strict scrutiny."

Id. at 684-85.

consideration" cases).

All of that line-drawing and doctrinal blending has, not surprisingly, rendered Georgia NCA law "muddled." Harbour, 54 Mercer L.Rev. at 1190; *see also id.* at 1197, 556 S.E.2d 460 (the only certainty in this area of law is continued uncertainty); *Keener II*, 342 F.3d at 1268 (illuminating yet another conflict in Georgia restrictive-covenant law after having just asked the state's supreme court to resolve the conflict noted in *Keener I*). This Court must again attempt to clarify it to reach the questions raised here.

Most of the Georgia appellate cases analyze covenants appearing in employment contracts executed in connection with the sale of a business (hence, hybrid NCA packages) by determining the bargaining capacity of the employee; if the employee's bargaining capacity "was not significantly greater than that of a mere employee, then the covenant should be treated like a covenant ancillary to an employment contract." *White*, 251 Ga. at 208, 303 S.E.2d 746.

The employee in *White* owned a relatively small amount of stock in the merging company there, and he was not involved in the merger negotiations. *Id.* at 207, 303 S.E.2d 746 (Where vice president of advertising company who owned less than 5% of company's stock signed NCA with corporation which acquired the company, and his profit on exchange of stock was strictly proportional to that which was received by all other shareholders, 94% of whom were not asked to make such covenants, and where he was fired after the merger, such vice-president's bargaining capacity was not significantly greater than that of mere employee, so NCA would be treated like covenant ancillary to employment contract; thus, trial court erred in "blue penciling" such covenants and in granting injunction to enforce them in judicially edited form). Invalidating the NCA there, that court emphasized

> that despite [White's] ownership of a relatively small, interest in [the acquired company, or "seller"], and *his potential veto power over the*

> *merger*, [he] had no control over overall management of [the seller], and in fact had so little bargaining clout within [it] that he was unable to prevent his own termination. He was nothing more than an employee, albeit an *important* one, and as an employee White could reasonably have assumed that if he did not do as [the seller] and [buyer] wished he would be stigmatized as not being a team player, thereby jeopardizing his career prospects with [the seller].

Id. at 207, 303 S.E.2d 746 (emphasis added).

Viewed through the "bargaining power" lens here, the record shows that although Meathe in 1997 was a senior J&H executive, he also was a (minor) J&H shareholder (1/3 of 1%), and MMC does not even contend that he held an "veto" power over the merger (which, as *White* shows, is still not enough to place him above "mere employee" status).

Indeed, the 1997 Agreement itself distinguished between sellers who were J&H Directors and those who were not. Meathe was not, nor was he one of the individuals specifically referenced in the Agreement. Nor did he sign it. The Agreement therefore is not generic to all shareholders, and simply labeling all shareholders as "sellers" adds nothing, for nomenclature cannot trump substance.

MMC also does not claim that Meathe controlled (or was in a position to control) the merger or its terms, much less J&H's management. Nor does it claim that he bargained at all with respect to any of the 1997 Agreement's terms. The Agreement's "Definitions" section specified that the "term 'knowledge' when used in this Agreement with respect to [J&H] shall mean the actual knowledge of [various individuals who do *not* include Meathe]...." Doc. #17 App. A at 105 ¶11.3(d). The Agreement also contains a merger clause, *id.* ¶10.4, 303 S.E.2d 746 ("Entire Agreement"); *see also id.* ¶10.1, 303 S.E.2d 746 (written modification only), and MMC does not point to any extra-contractual agreements

or representations in any event.

The 1997 Agreement also fails to provide, and MMC does not assert, that Meathe's agreement to work for Marsh was a merger precondition. It also treats separately Meathe's sale of his stock and his acceptance of employment with Marsh. One portion (tied to his stock sale) restricts him for 5 years (now expired), while the other (his continued employment) restricts him for 2 years.

MMC does not dispute that the 2-year component is the only NCA that still applies to Meathe. That the two (5-year and 2-year) components are severable and stand-a-lone in legal import is underscored by MMC's agreement that only the 2-year restriction still survives for potential enforcement here.

Though the 1997 Agreement lacks the specific, express differentiation (between the business-sale and employment covenants) seen in *Pratt, see supra* note 7, nevertheless under both the totality of the circumstances and this case's overall factual similarity to *White*, the Court concludes that it falls into "employment-contract" category. That, in turn, subjects it to the no-blue-penciling doctrine.

Because the 1997 Agreement contained an unenforceable clause (*i .e.,* prohibiting Meathe from *accepting* competing business) the entire Agreement is invalidated under the reasoning set forth in *White* and its progeny (*e.g., Waldeck*). All of MMC's cases are easily distinguishable. For example, the *Hudgins* court specifically noted that the evidence belied the executive shareholder's "mere employee" bargaining power in that case, where he sold a proportionally much larger share of a *family* business as opposed to a much larger, non-family held business here. 250 Ga.App. at 286-87, 551 S.E.2d 393.

And "Hudgins's employment terminated when [that business] was sold, so the covenant not to compete was *not* ancillary to continued employment." *Hudgins*, 250 Ga.App., at 285, 551 S.E.2d 393 (emphasis added). Hence, the NCA there could be blue-penciled because it was not tied to any sort of employment contract. *Id.* at 286-87, 551 S.E.2d 393. The *Hudgin* NCA thus fell into the sale-of-business category.

MMC also cites *Drumheller* v. *Drumheller Bag & Supply, Inc.*, 204 Ga.App. 623, 420 S.E.2d 331 (1992), where the court held that a broad restraint in an employment agreement should be treated under the standard applicable to covenants ancillary to the sale of a business. There three employees in a *close-knit* business each owned between 5% and 13.5% (collectively, then, 25%) of their company's stock prior to its sale, when they executed *employment* contracts that "were a *large* part of the mutual consideration of the stock sale agreement and *thus* were part of the same transaction." *Id* at 637, 420 S.E.2d 331 (emphasis added). The court thus concluded that it was fair to place their deal into the "sale-of-business" zone, thus permitting blue-penciling of otherwise overbroad restrictive covenants.

The *Drumheller* court emphasized that the three employees were represented by counsel in the sale and that there was no "unfair pressure" exerted on them to sell their stock. *Id.* at 626-27, 420 S.E.2d 331. While the court did not specifically hold that the employees there had bargaining power greater than that of a mere employee, it's reasonable to infer from its discussion of the facts that the employees in fact did have some heightened bargaining capacity.

In contrast, there is no allegation that Meathe had enough influence to queer the MMC-J&H deal, much less alter its terms. Nor does MMC allege that he did. *See* doc. #25. And the *Drumheller* employees owned far greater ownership shares in a far smaller, "close knit" company than was the case here, where Meathe owned 1/3 of 1% (out of total of 49 shareholders, while there were only 8 in *Drumheller*. 204

Ga.App. at 624 n. 2, 420 S.E.2d 331).

The *Drumheller* employees also "executed the[ir] employment contracts as part of the stock sales agreement," *id.* at 626, 420 S.E.2d 331, while here Meathe sold his J&H stock then accepted MMC's employment offer in two separate transactions. Doc. #17 App A ("Stock Purchase Agreement" covering Meathe's sale of his stock but silent as to his continued employment with MMC). Finally, whatever reach *Drumheller* and *Hudgins* may be said to have, they are intermediate appellate court decisions which mus yield to the Georgia Supreme Court reasoning found in *White*, a case that not only more closely fits the facts here, but more forcefully constrains this Court to deem, under its reasoning, the 1997 Agreement an employment-based NCA.

Turning to the 2002 Agreement, there can be no serious dispute that is an *employment* agreement, in that there is not even any hint that Meathe sold controlling ownership shares of stock to MMC when he signed same. While he at that time was a Marsh Managing Director and head of its midwest region, he cannot be analogized to a partnership professional (*e.g.* a doctor) who signed an NCA in conjunction with the sale of his partnership shares. MMC's citation to such cases therefore are unconvincing here.

Nor, finally, does MMC cite to any Georgia precedent showing that merely being an executive with an executive compensation package somehow elevates an employment-based NCA to a sale-of-business NCA scrutiny level. *Cf. AGA, LLC* v. *Rubin*, 243 Ga.App. 772, 775, 533 S.E.2d 804 (2000) ("We cannot agree with [the employer] that the covenant should receive less scrutiny simply because [the employee] was a physician. The facts do not suggest that [the employee] was a partner, shareholder, or other form of owner or manager of [the employer]").

It follows that the "strict scrutiny" that Georgia courts apply to employment-based NCAs must be applied to both the 1997 and 2002 Agreements which, so viewed, are fatally

flawed in at least one respect: they both prohibit Meathe from *accepting* business from MMC competitors whether he solicits them or not. *See Waldeck* 261 Ga.App. at 593, 583 S.E.2d 266 (because "blue pencil" doctrine of severability did not apply, determination that non-solicitation clause in employment agreement preventing former employee from *accepting* business from unsolicited former clients of employer was unenforceable made all other non-solicitation clauses included in agreement likewise unenforceable).

In that regard, MMC cites no *Georgia* law enabling the employer to "self-blue-pencil." Nor does this Court believe Georgia courts would sanction that (otherwise, employers could load up NCAs with oppressively overreaching terms and intimidate all but the litigation-hardy employees, then post-hoc excise offending provisions to avoid requested judicial invalidation by those employees who can afford to litigate). In light of this result, it is not necessary to reach plaintiffs' remaining arguments as to why the NCA's are unenforceably overbroad.

V. CONCLUSION

MMC's oral argument request (doc. #24) is *GRANTED* (the Court heard oral argument on 10/27/03). Plaintiffs' JOP motion (doc. #17) is *GRANTED IN PART AND DENIED IN PART*. The Court declares the above-described 1997 and 2002 NCAs unenforceable within the State of Georgia. MMC is therefore enjoined from enforcing them against Meathe in Georgia. *See Keener II*, 342 F.3d at 1269. This Order is binding on MMC within the scope set forth in Rule 65(d)-hence, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

In that it is unclear what all this does to MMC's Counterclaims, though most seem doomed because they depend on Meathe's breach of now unenforceable covenants. The parties therefore shall confer within ten days of the date

this Order is served and attempt settlement aimed at closing out this case. Short of that, they shall submit a Status Report, if not also further dispositive motions.

This 11 day of November, 2003.

s/_____
B. AVANT EDENFIELD,
UNITED STATES DISTRICT JUDGE

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARSH & MCLENNAN COMPANIES, INC.,

Petitioner,

v.

PALMER & CAY, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner claims that a final decision of a federal court sitting in Georgia in a diversity action should not be considered *res judicata* in a subsequent action between the same parties in the courts of another State or in a federal court sitting in another State when the decision is based on Georgia law, including Georgia's public policy. As the Defendant in the District Court, Petitioner admitted jurisdiction and venue and did not object on appeal to the choice of Georgia law.[1] The question is as follows:

Whether the final judgment of a federal court sitting in Georgia with jurisdiction over the parties and the subject matter is *res judicata* as between those parties in the other courts of the United States and the various States.

---

[1] The District Judge noted, "At 10/27/03 oral argument, MMC [Petitioner] conceded that Georgia public policy (hence, Georgia law) must be satisfied 'as a threshold matter.'" (Pet. 32a n. 4).

RULE 29.6 DISCLOSURE STATEMENT

Respondent Palmer & Cay, Inc. is a wholly owned subsidiary of Wachovia Corp. No publicly held entity owns 10% or more of the stock of Wachovia Corp.

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INTRODUCTION

Petitioner's contention that the decision of the Court of Appeals in this case "undermines the ability of the individual States to implement their own public policies as to the enforceability of contracts within their own borders" (Pet. 1-2) is hyperbole. It is, rather, the Petitioner's position that would undermine the jurisdiction of the federal district courts in diversity actions and of the courts of the various States to decide civil disputes between litigants over which such courts have jurisdiction by a final judgment that is claim and issue preclusive.

The Court of Appeals in this case clarified a misconstruction of its earlier decision in *Keener v. Convergys Corp.*, 342 F.3d 1264 (11th Cir. 2003). The opinion in *Keener* induced at least two trial courts, including the District Court in this case, to err in restricting declaratory judgments to the geographic boundary of Georgia. In *Hostetler v. Answerthink, Inc.*, 599 S.E.2d 271 (Ga. App. 2004), the Georgia Court of Appeals reversed a trial court's order which cited *Keener* and restricted the effect of its ruling to the State of Georgia because the ruling was based on Georgia public policy. The appellate court noted that the judgments of the Georgia courts are entitled to full faith and credit in all of the other states and that the trial court's reliance on *Keener* was misplaced. In this case, the United States Court of Appeals clarified that *Keener* did not really mean that the final judgments of the Georgia courts were not entitled to full faith and credit even when based on Georgia's public policy.

Just "anyone who wishes to evade his obligations under a legitimate non-solicitation agreement" (Pet. 2) will

be unable to invoke the laws of the State of Georgia. The Georgia courts are not open to "just anyone." In this case, the respondent James B. Meathe was a bona fide resident of the State of Georgia at the time the action was commenced, the respondent Palmer & Cay, Inc. was a Georgia corporation with its principal place of business in Savannah, Georgia, and the Petitioner transacted business in Georgia.

"[A] corporation with no connection to Georgia" (Pet. 2) is protected from being sued in Georgia by Constitutional due process. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In this case, there was no dispute that Petitioner had sufficient contacts with Georgia to subject it to the jurisdiction of the District Court for the Southern District of Georgia, and Petitioner expressly admitted jurisdiction and venue in its answer.

The Court of Appeals' decision in this case does not allow "one State [i.e. Georgia] to control the enforcement of contracts in its sister States based on its own unique judgments about public policy." (Pet. 2). The courts of Georgia's sister States may adjudicate civil cases between litigants over which those courts have jurisdiction under such States' laws including its choice of law rules without regard to the laws of Georgia, and a judgment in such a case is entitled to full faith and credit in the Georgia courts even when the result would have been different if decided by a Georgia court under Georgia law. More in point, the final judgment of a federal district court sitting in a diversity case in a sister State with jurisdiction over the parties before it is claim and issue preclusive in a subsequent case between the same parties in a Georgia court and in a district court sitting in Georgia in a diversity action. By the same token, as held by the Court of

Appeals, the final judgment of the United States District Court for the Southern District of Georgia in this case is claim and issue preclusive in the other state and federal courts of the United States.

STATEMENT

1. Invoking federal diversity jurisdiction, Respondents James B. Meathe, a citizen of Georgia, and Palmer & Cay, Inc., a Georgia corporation with its principal place of business in Georgia, commenced a civil action in the United States District Court for the Southern District of Georgia against Petitioner Marsh & McLennan Companies, Inc. seeking a declaratory judgment that certain restrictive covenants were invalid and unenforceable.

2. Petitioner answered without objection to venue or jurisdiction and asserted various counterclaims.

3. Applying Georgia law, the District Court held that the covenants were invalid and unenforceable, but citing *Keener v. Convergys Corp.*, 342 F.3d 1264 at 1269 (11th Cir. 2003), limited the effect of its ruling to the State of Georgia.

4. Petitioner did not contend on appeal that it was error for the District Court to choose to apply Georgia law, but, rather, contended that the District Court committed error in holding that the subject restrictions were unenforceable under the applicable Georgia law. Respondents contended in the Court of Appeals that the District Court committed error in limiting the preclusive effect of its holding to the State of Georgia.

5. The United States Court of Appeals for the Eleventh Circuit held that the District Court's judgment precludes relitigation of the issues and claims in other states and that it was error for the District Court to limit the application of its judgment to the State of Georgia.

REASONS FOR DENYING THE WRIT

The central question in this case is not "whether considerations of federalism and state sovereignty preclude the application of one State's law to preempt the laws of 49 other States with respect to the enforceability of non-compete or non-solicitation agreements." (Pet. 7). Respondents do not contend, and the court below did not hold, that Georgia law and public policy have any extra-territorial application. The parties in this case appeared in and presented a civil dispute to the United States District Court for the Southern District of Georgia and the District Court decided that dispute applying Georgia law. Petitioner never objected to the jurisdiction of the court and never attempted to invoke a forum selection clause purporting to require that disputes be resolved in New York. Petitioner, after conceding in the District Court at oral argument that Georgia law applied, did not contend on appeal that it was error for the District Court to apply Georgia law, but rather argued that the decision was contrary to Georgia law. Petitioner now contends that because the judgment is based on Georgia law, it should be entitled to relitigate the case in other states.

There is no reason why the Supreme Court should review this decision which is based on fundamental, straightforward claim and issue preclusion.

1. Petitioner failed to raise the issue of whether the Georgia choice of law rule applied in this case constitutes an unconstitutional burden on interstate commerce or violates the contract clause of the Fourteenth Amendment in the court below and the issues were not considered in the court below.

The Petitioner hints at the argument that the choice of Georgia law based on Georgia's public policy is an unconstitutional burden on interstate commerce (e.g. Pet. 14 et seq.) and violates the contract clause of the Fourteenth Amendment (e.g. Pet. 9-10). Because Petitioner failed to raise those issues in the court below and the court below did not consider those issues, this Court should decline to consider Petitioner's claims in the first instance. *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999).

2. The Court of Appeals' ruling that a district court sitting in Georgia in a diversity action governed by Georgia law with jurisdiction over the parties should *not* limit the application of its judgment to Georgia is required by long settled, fundamental principles of claim and issue preclusion and is consistent with Constitutional Full Faith and Credit requirements applicable to state court judgments.

This Court's holdings in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (Illinois statute requiring contour mud guards on trucks held unconstitutional burden on interstate commerce based on extensive evidence of cost, safety issues and conflicts with other states' laws); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (considering whether a punitive damage award by an Alabama

court exceeded Fourteenth Amendment Due Process limitation); *Brown-Forman Distillers Corporation v. New York State Liquor Authority*, 476 U.S. 573 (1986) (State law requiring liquor producers to charge wholesalers in the State no more than the lowest price charged wholesalers elsewhere in the United States held to violate Commerce Clause); *Edgar v. MITE Corporation*, 457 U.S. 624 (1982) (Illinois statute purporting to regulate tender offers in a manner conflicting with Williams Act held to violate Commerce Clause and Supremacy Clause); *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003) (considering whether award of $145,000,000 on $1,000,000 compensatory award violates Due Process Clause); *Nevada v. Hall*, 440 U.S. 410 (1979)[2] (considering whether federal law prohibits a California court from entering judgment against Nevada in an amount in excess of a Nevada statutory limit); and *State of Kansas v. State of Colorado*, 206 U.S. 46 (1907) (original action between two States regarding diversion of the Arkansas River), have no application to this case.

Although the Full Faith and Credit Clause explicitly refers to the judgments of the various states, the principles of the Full Faith and Credit Clause and *res judicata* apply with equal force to the judgment of a district court in a diversity action governed by state law. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); *see also Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 618

[2] The opinion in *Nevada v. Hall*, 440 U.S. 410 (1979), recognized that "[a] judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter. . . . [T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Id.* at 421-22.

(8th Cir. 1994), citing *Semler v. Psychiatric Institute of Washington, D.C., Inc.*, 575 F.2d 922, 927-28 (D.C. Cir. 1978) (requiring "a federal court exercising diversity jurisdiction in forum II to give the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I."); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 154 (5th Cir. 1974) (holding that federal court proceedings must be given by state courts the same full faith and credit due the judicial proceedings of another state).

The Court of Appeals' decision is consistent with the current view of the Full Faith and Credit Clause as expressed by this Court in *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). *Baker* reiterated the long-standing principle that as long as a court has adjudicatory authority over the subject matter and persons governed by a judgment, the Full Faith and Credit Clause demands that the judgment "qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force." *Baker*, 522 U.S. at 233. *Baker* relied upon the very purpose of the Full Faith and Credit Clause to "alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Baker*, 522 U.S. at 232 (citing *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

Not only did *Baker* reiterate the basic principles of the Full Faith and Credit Clause, but it did so in the context of

a judgment based on state public policy. The Supreme Court drew a crucial distinction between a court's decision to utilize a particular state's law based on public policy, and the credit owed to a judgment rendered pursuant to that public policy by the courts of that state in the other forty-nine states. While "a court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy . . . our decisions support no roving 'public policy exception' to the full faith and credit due judgments." *Baker*, 522 U.S. at 233. As *Baker* pointed out, even judgments completely repugnant to a state's public policy must be recognized under Full Faith and Credit. *See Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (judgment of a Missouri court entitled to full faith and credit in Mississippi even though Missouri judgment rested on a misapprehension of Mississippi law); *see also*, *Marina Associates v. Barton*, 563 N.E.2d 1110 (1990) (Illinois must recognize judgment obtained in New Jersey for gambling debt); *Valley Nat'l Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997) (a federal court cannot refuse based on federal public policy to enforce a validly entered state judgment); *Bryant v. Shields, Britton & Fraser*, 930 S.W.2d 836, 840 (Tex. App. 1996) (a court must extend full faith and credit to a valid judgment from another state regardless of the forum state's public policy); *Int'l Recovery Sys., Inc. v. Gabler*, 527 N.W.2d 20, 22 (Mich. Ct. App. 1994) (Nevada judgment for gambling debt enforceable in Michigan despite the fact that enforcement of gambling debts is contrary to Michigan's public policy); *Clark v. Rockwell*, 435 S.E.2d 664, 667 (W. Va. 1993) (noting that states cannot deny full faith and credit based on public policy considerations); *Speyer v. Cont'l Sports Cars, Inc.*, 518 N.E.2d 39, 42 (Ohio Ct. App. 1986) (holding that "[a] valid judgment rendered in Texas will be recognized and

enforced in Ohio even though the strong public policy of Ohio would have precluded recovery in its courts on the original claim").

While this Court has recognized a Fourteenth Amendment limitation on a state court's choice of law in a contract case, *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914), the limitation does not apply to the Georgia choice of law rule in this case wherein one of the parties to the contract was a bona fide resident of the State of Georgia when the action was commenced and the other party transacted business in Georgia and admitted jurisdiction. Here, the question is not whether a non-resident can ask a Georgia court to reach out and enforce Georgia law in another state. Instead, the issue is whether Respondent Meathe, a Georgia resident, can seek a Georgia court's protection when a corporation seeks to enforce a contract in Georgia that is unenforceable under Georgia law and public policy.

> This Court's decision in *Pacific Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940, clearly establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy.

Nevada v. Hall, 440 U.S. 410, 421-22 (1978); *see also Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (citing *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914) but holding that California could enforce its own public policy in California, as opposed to enforcing Alaska's laws).

3. The decision below – that the ruling of a district court in a diversity action in which the parties are subject to the court's jurisdiction is claim and issue preclusive – does not create a "perverse regime in which any employee can achieve nationwide invalidation of a non-solicitation agreement."

There is nothing perverse about Georgia's rule of law, based on its constitutional provision, that it will not "blue pencil"[3] overly broad and, thus, invalid restrictive covenants that are ancillary to employment. "It is a part of the public policy of [Georgia] to suppress monopolies and to encourage competition, and to this end restrictions on the right of any person, firm, or corporation to engage in its business and to do business with those members of the public who choose to partake of its services are not favored. [1983 Ga. Const. Art. III, Sec VI, Par. V; O.C.G.A. § 13-8-2]." *Troup County Electric Membership Corp. v. Georgia Power Co.*, 191 S.E.2d 33, 36 (Ga. 1972).

As previously noted, the Georgia law has no nationwide application and its courts do not enjoy nationwide jurisdiction. The jurisdiction of the courts sitting in Georgia, as well as the other states, is limited by due process. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Petitioner's three putative reasons for stating that the Court of Appeals' decision is perverse have no merit. (Pet. 12-18).

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[3] The Georgia courts define "blue pencil" as "judicial editing of covenants which were not written in such a way that they are divisible by simply excising certain parts or words from them." *White v. Fletcher/Mayo/Assocs., Inc.*, 303 S.E.2d 746, 748 n. 1 (Ga. 1983).

The fact that our federal system allows a state to serve as a laboratory for social and economic experiments does not undermine the necessity of issue and claim preclusion.

Petitioner has failed to produce any evidence that the Court of Appeals' decision has the potential to deprive U.S. employers of the economic benefits of non-solicitation agreements.

Petitioner's third reason offered to support its contention that the Court of Appeals decision "will have a perverse effect on the administration of justice nationwide" (Pet. 15) fails to take into account the perverse effect of allowing the Petitioner to re-litigate issues and claims in other courts that it first litigated in the United States District Court for the Southern District of Georgia. The burden and confusion of allowing a party to relitigate the same claim against the same party in another forum are clear.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

MARSH & MCLELLAN COMPANIES, INC.,

Petitioner,

v.

PALMER & CAY, INC. AND JAMES B. MEATHE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America (the "Chamber") hereby moves pursuant to Supreme Court Rule 37.2(b) for leave to file the attached *amicus curiae* brief in support of Marsh & McLennan's petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. *Amicus* is filing this motion because consent to the filing of this brief was granted by counsel for Petitioner but denied by counsel for Respondents.

The Chamber is the Nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. Because rules of law that place appropriate limits on the territorial boundaries of state sovereignty and promote respect for the validity and enforceability of contracts are of great importance to the business community, the Chamber regularly files *amicus* briefs in cases that threaten the orderly formation and regulation of commercial agreements in interstate commerce.

The Eleventh Circuit's decision (1) applies Georgia law to void an otherwise valid non-compete agreement that was formed outside of Georgia and intended to have nationwide application; and (2) imposes Georgia's public policy choice on Georgia's 49 sister States, all or virtually all of which would otherwise recognize and fully enforce the non-compete agreement. *Amicus* is concerned that the Eleventh Circuit's decision threatens the integrity and orderly judicial administration of contracts involving interstate commerce by ignoring (1) the clear conflicts presented between nationwide application of the substantive law of Georgia and fundamental principles of state sovereignty and comity; and

(2) the well-established limitations that the Commerce Clause imposes on a State's ability to project its authority extraterritorially. *Amicus* is uniquely positioned to assist the Court in this case because its members routinely enter into nationwide commercial agreements, and the Chamber has a fundamental interest in the enforcement of federal constitutional principles that promote certainty and predictability in contract formation and prevent any one State from imposing its public policy agenda on the rest of the Nation.

Accordingly, the Chamber respectfully requests that the Court grant leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the Nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. The members of the Chamber routinely enter into contracts involving interstate commerce and have a fundamental interest in the enforcement of federal constitutional principles that promote certainty and predictability in contract formation and prevent one State from imposing its public policy agenda on the rest of the Nation. Accordingly, the Chamber regularly files *amicus* briefs in cases that implicate the conduct of interstate commerce and the orderly administration of justice in our federal system.

Through the decision below, and in the absence of any claim that there was a defect in contract formation, Respondents successfully appropriated Georgia law to void a non-compete agreement that was entered into outside of Georgia, that was intended to have nationwide effect, and that is recognized as both valid and enforceable in virtually every State in the Union. Sitting in diversity, the Eleventh Circuit voided the agreement nationwide, endorsing a rule of law that encourages States to outflank one another in an effort to exert nationwide control over contested questions of public law and policy, thus wreaking havoc upon the ability of parties to define their rights and obligations in contracts involving interstate commerce.

1. A motion for leave to file this amicus *curiae* brief is attached hereto. Pursuant to Supreme Court Rule 37.6, *amicus curiae* declares that no counsel for any party to this case authored this brief in whole or in part and that no entity or person, other than *amicus* the Chamber, its members, and its counsel, made any monetary contribution to the preparation or submission of this brief.

By endorsing Respondents' stratagem, the Eleventh Circuit ignored the clear teachings of at least two lines of Supreme Court precedent. First, by mechanically invoking the *Erie* doctrine to accord a *sui generis* Georgia rule nationwide effect, the Eleventh Circuit violated the fundamental principle that, in a federal system composed of a national government and fifty independent, subordinate sovereigns, the judicial process cannot be subverted to permit one State to impose its will on the entire country. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Second, whatever power the State of Georgia may have to regulate contracts formed within its borders, a rule of decision that permits the application of Georgia law to void a contract formed out-of-state and intended to govern the parties' conduct nationwide plainly imposes an unconstitutional burden on interstate commerce. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337-39 (1989).

For the reasons set forth below, *amicus* respectfully urges this Court to grant certiorari to reinforce these principles and correct the Eleventh Circuit's erroneous assumption that a federal court sitting in diversity is required to apply State rules of decision even where application of those rules transgresses clear constitutional limitations on the capacity of a State to interfere with commercial relationships beyond the State's borders.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted Because The Eleventh Circuit's Extraterritorial Extension Of Georgia Law Fundamentally Undermines The Stability And Comity Essential To The Formation And Enforcement Of Contracts Involving Interstate Commerce.

This case addresses the limits that the Constitution places on the power of a single State to apply its law, acting through its own judiciary or through the federal judiciary sitting in diversity, to (1) void a contract involving interstate commerce in the absence of any alleged defect in contract formation; and (2) project the force of its ruling nationwide. The essential facts, more fully set forth in the Petition, are as follows. Respondent James Meathe was employed by Petitioner Marsh & McLennan ("Marsh"), a national and international insurance brokerage company, from 1997 to 2003 following Marsh's acquisition of Meathe's former employer Johnson & Higgins. In connection with his employment by Marsh, Meathe signed a "client and employee non-solicitation agreement" in 2002 in exchange for the right to exercise certain Marsh stock options (the "2002 Agreement"). Pet. App. 5a. In relevant part, Meathe agreed under the 2002 Agreement "to be bound by customer and employee non-solicitation covenants set to expire two years after Meathe's last day of work at [Marsh]." *Id.*

Meathe left Marsh's employ in January 2003 and moved to Georgia to become President of Respondent Palmer & Cay, an insurance brokerage company and direct competitor of Marsh. *Id.* at 6a. Meathe and Palmer & Cay then sued Marsh in the U.S. District Court for the District of Georgia seeking to enjoin Marsh from enforcing the two-year non-solicitation provision. *Id.* at 7a.

The district court, sitting in diversity, began by applying Georgia's choice of law rules under the doctrine set forth in *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938). Noting that, under Georgia law, a court is constrained to "first apply Georgia law to determine if enforcement of a restrictive covenant offends the state's public policy," Pet. App. 31a, the district court held that the provisions of the 2002 Agreement that barred Meathe from "accepting business" from certain unsolicited Marsh clients violated Georgia's public policy. *Id.* at 42a-43a; *see, e.g., Waldeck v. Curtis 1000, Inc.*, 583 S.E.2d 266, 268 (Ga. Ct. App. 2003) (holding that "a covenant prohibiting a former employee from merely accepting business, without any solicitation, is not reasonable").[2] Georgia stands out among the 50 States in its refusal to honor non-compete arguments similar to the one at issue.[3] In determining that the non-compete agreement was unenforceable, however, the district court properly limited

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2. The district court also applied Georgia's "'no blue-penciling' doctrine," which holds that "one flawed . . . [non-compete] provision" can "unravel" a non-compete agreement and invalidate the entire contract. Pet. App. 35.

3. As one commentator has observed, Georgia's hostility to non-compete agreements is second to none. *See* Christopher D. David, *When A Promise Is Not A Promise: Georgia's Law On Non-Compete Agreements, As Interpreted By The Eleventh Circuit In Keener v. Convergys Corporation, Gives Rise To Comity And Federalism Concerns*, 11 J. Intell. Prop. L. 395, 396 (Spring 2004) ("While some courts are fairly lenient and uphold most NCAs, others apply strict scrutiny to these covenants and refuse to enforce NCAs that do not fit their particular tastes. Of these restrictive jurisdictions, perhaps the most extreme are Georgia and California. Both states routinely strike down such covenants as unenforceable.") Though "California, unlike Georgia, expresses its policy against restraints on trade via statute and not constitution . . . the two states' policies against restraints on trade are similar in structure and effect." *Id.* at 405 n.64 (*comparing* Ga. Const. art. 3, § 6, ¶ V(c), with Cal. Bus. & Prof. Code § 16600 (West 1999)).

its ruling to enforcement "*within the State of Georgia*. [Marsh] is therefore enjoined from enforcing [the agreement] against Meathe *in Georgia*." Pet. App. 43a (emphasis added) (citing *Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003)). The district court declined to declare the non-compete agreement void outside of Georgia.

On appeal, the Eleventh Circuit affirmed the district court's application of Georgia law to the non-compete agreement, but reversed the district court's decision to the extent that the district court limited the geographic scope of its ruling to the territorial boundaries of Georgia. Relying upon Georgia law and federal common law,[4] the Eleventh Circuit determined that because "Georgia does not attempt to limit its declaratory judgments in cases involving non-competition agreements . . . [a] federal district court sitting in Georgia and applying Georgia law should not do so either." Pet. App. 21a-22a (citing, *inter alia*, *Hostetler v. Answerthink*, 599 S.E.2d 271, 275 (Ga. Ct. App. 2004)). The Eleventh Circuit thus declared the non-compete agreement void nationwide and called upon courts outside of Georgia to honor its determination under principles of collateral estoppel.

Under the Eleventh Circuit's application of *Erie*, a valid contract that is intended to regulate private commercial conduct nationwide and is fully enforceable under the law of 49 States can be completely negated if one party to the contract secures personal jurisdiction over the other contracting party in the 50th State and persuades that State's courts to invoke local public policy to nullify the instrument. In an increasingly fluid, technology-driven economy that finds corporations "doing business" everywhere, it is not difficult for enterprising plaintiffs to ensnare corporate

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4. Pet. App. 21a (stating that "an enforcing court should apply the law of the state courts").

defendants in virtually any forum of their choosing. Furthermore, unless reversed, the broader implications of the rule endorsed by the Eleventh Circuit are profoundly disruptive of interstate commerce.

Under the Eleventh Circuit's reasoning, a party to a contract that regulates conduct nationwide can contrive to bring suit in a State whose courts will void the contract in whole or in part, and project the forum State's judgment throughout the Nation, nullifying the agreement and stripping the other contracting party of the benefits of the bargain. In turn, this invites rampant forum shopping and a legal "race to the bottom," encouraging State legislatures and courts to create idiosyncratic havens where forum-shopping parties can seek to avoid obligations widely recognized and enforced in sister States. The threat of such abuses will force contracting parties to consider modifying both their contracting practices outside of those havens and their commercial presence within them in an effort to avoid their jurisdiction. Thus, because the rule endorsed by the Eleventh Circuit poses a grave threat to the integrity of interstate agreements, the rule necessarily and adversely affects the conduct of interstate commerce both pre- and post-adjudication.

II. Certiorari Should Be Granted Because The Eleventh Circuit's Reflexive, Nationwide Application Of Georgia Law Ignores The Inherent Limitations On A State's Authority To Impose Its Laws Extraterritorially

A. In Our Federal System, A State Has No Authority To Impose Its Legal Or Policy Judgments Nationwide

As one State Supreme Court has observed:

> [N]o state should impose its law in a situation when its parochial rules would unduly and without substantial reason so impinge upon another state as to interfere with the free flow of commerce or the exercise of another state's legitimate policies in such a manner that would invite retaliation from another jurisdiction.

Heath v. Zellmer, 151 N.W.2d 664, 672 (Wis. 1967). This Court has long since concluded that state "[l]aws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extra-territorial effect only by the comity of other states." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). In particular, it is "impossible to permit the statutes of [a State] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); *see also Gore*, 517 U.S. at 571 ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular.") (quoting *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881)); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons

or property would offend sister States and exceed the inherent limits of the State's power.").[5] Thus, regardless of the ambitions of State law, federal courts have a unique obligation to ensure that one State does not impose its law and public policy on the other 49 States or on the operation of interstate commerce.

In the field of contracts, the unique federal interest that makes extraterritorial application of a forum state's law inappropriate is particularly weighty where the forum state is a stranger to the contract in dispute.[6] After all, "[t]here is no necessary congruity between the basis for competence of a court and the basis for choice of law." *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690, 697 (E.D.N.Y. 1984); *see also Heath*, 151 N.W.2d at 672 ("Deference to the substantial interests of another state are necessary and for a state that is only minimally concerned with a transaction or tort to thrust its law upon the parties would be disruptive of the comity between states.").

To this end, the Court has pointed to the Due Process Clause and the Full Faith and Credit Clause as placing certain "restrictions on the application of forum law." *Phillips*

5. As this Court has explained, the principle that prohibits individual states from acting extraterritorially "is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound." *State Farm*, 538 U.S. at 421 (quoting *New York Life Ins. Co.*, 234 U.S. at 161) (internal quotations omitted).

6. Once the Court determines that the forum State's law should not be applied, the court has a choice to "consider whether to borrow existing state law principles or to 'resort to uniform federal rules.'" *United States v. Crown Equip. Corp.*, 86 F.3d 700, 706 (7th Cir. 1996) (quoting *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 728-29 (1979)). Here, the strong federal interest in bolstering the predictability and stability of contracts in interstate commerce demands application of uniform federal rules.

Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985).[7] "These restrictions require[] that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* (citations and quotations omitted). Indeed, as the decision below amply demonstrates, "[i]f a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." *Id.* at 820 (quoting *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 337 (1981)) (internal quotations omitted).

For all of these reasons, the Eleventh Circuit should not have applied Georgia law, as it did, to *void* the non-compete agreement nationwide. And, the Eleventh Circuit certainly should not have relied on Georgia's idiosyncratic rule against non-compete agreements to dictate the parties' rights and obligations throughout the country. Georgia has neither a sufficient connection to the subject matter of the suit nor a "legitimate interest" in reaching beyond its territorial borders to void otherwise lawful commercial arrangements, and Georgia may not use its peculiar choice of law rule "as a means of imposing its regulatory policies on the entire

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7. The constitutional imperative to reject Georgia law in this case is not an attack on full faith and credit. The Full Faith and Credit Clause properly requires state courts to accept the judgments of their sister States. The extraterritorial impact of full faith and credit, however, adds a constitutional dimension to the anterior choice of law question, regardless of whether the question is framed in terms of (1) which State's law should be applied to the dispute; or (2) as in this case, whether a State rule of decision should be literally applied in light of the preclusive effects that will follow based on the manner in which the court's judgment is framed. This case illustrates the pernicious consequences that follow from reflexively applying the forum State's law without regard for the interstate ramifications of such application.

Nation." *Gore*, 517 U.S. at 585. Accordingly, certiorari should be granted to correct the Eleventh Circuit's decision to resolve the parties' dispute by imposing Georgia law beyond Georgia's borders.

B. The Eleventh Circuit's Decision Ignores The Unique Federal Interests Implicated By A Single State's Refusal To Enforce A Contract Involving Interstate Commerce That Is Both Valid And Enforceable Beyond The State's Borders

The Eleventh Circuit erred in reflexively applying Georgia law to void the non-compete agreement nationwide. It is, of course, a bedrock principle of federal law that *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), generally requires a federal court sitting in diversity to apply the substantive law of the forum state. *Erie*, however, is not an absolute command when there are important, countervailing federal interests at stake. Rather, this Court has made clear that certain "areas, involving *uniquely federal interests*, are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by . . . federal common law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (internal citations and quotation omitted) (emphasis added).[8]

This Court's decisions heretofore have defined "unique federal interests" to include "the rights and obligations of

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8. The federal interest exception to the *Erie* doctrine has been characterized as serving "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). In this case, the Eleventh Circuit's refusal to contain the extraterritorial application of Georgia law *encourages* forum shopping and *inequitably* deprives Marsh of the benefit of its bargain in scores of States that would hold Respondents to the letter of the non-compete agreement

the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted). "In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Id.*

Thus, for example, in a case decided the same day as *Erie*, the Court relied on federal common law to resolve a dispute over the apportionment of interstate waters. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). In *Hinderlider*, the Court determined that reliance on state law was inappropriate even though the dispute was between two private litigants and the relevant States could not be joined. *Id.* As the Court later explained, the application of federal common law was necessary because "no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (discussing *Hinderlider*, *supra*).

Here too, there is a unique federal interest in preventing one State from reforming or rescinding the terms and conditions of contracts involving interstate commerce through the application of parochial choice of law rules. The federal courts, as decisions such as *Gore* and *State Farm* make clear, have an overarching interest in enforcing the respect for state sovereignty that our constitutional design requires. This unique federal interest is reflected in congressional enactments as well. *See, e.g.*, 9 U.S.C. § 2 (Federal Arbitration Act) ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of

such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").[9]

There is a stark difference between a State's refusal, on the one hand, to *enforce* within its borders a contractual provision that violates the State's public policy, and a State's decision, on the other hand, to declare that a contractual provision is void *ab initio*. And, absent any defect in contract formation, a State's attempt to project its invalidation of an out-of-state contract on the entire Nation based on its own public policy considerations certainly exceeds all constitutional bounds.

Consequently, regardless of whether the problem presented here is characterized as one that calls for the application of federal common law to restrain the application of a Georgia rule of decision beyond the State's territorial authority to regulate, or a simple refusal to void an interstate contract when, at most, a State can refuse to *enforce* an otherwise valid interstate contract within its borders, there is an overriding federal interest in ensuring that Georgia's idiosyncratic refusal to enforce non-compete agreements is not accorded nationwide effect.

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9. On this record, there can be no doubt that the contract at issue comprehended "a transaction involving commerce" as Congress defined that concept in the Federal Arbitration Act. *See, e.g., Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 106 (N.D. Ill. 1980) (explaining that a "contract between a . . . brokerage firm and its employee is a contract involving interstate commerce governed by the Act"), *aff'd*, 653 F.2d 703 (7th Cir. 1981).

C. The Eleventh Circuit's Imposition Of Georgia Law And Policy On The Entire Nation Violates The Commerce Clause.

As a separate and independent check on the power of individual States to impose their will extraterritorially, the Commerce Clause bars Georgia from imposing its idiosyncratic views of non-competition agreements and, specifically, its public policy objections to such agreements, on sister States. The Commerce Clause "follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States." *Gore*, 517 U.S. at 572; *see also State Farm*, 538 U.S. at 409 ("[A] State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor . . . does the State have a legitimate concern in . . . unlawful acts committed outside of its jurisdiction."); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer,* 165 F.3d 1151, 1153 (7th Cir. 1999) (per curiam) ("No state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders.") (citations omitted). This Court's decisions therefore "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-36.

Consistent with this end, the Commerce Clause "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden" interstate commerce. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98 (1994). The dormant or negative Commerce Clause "prohibits state . . . regulation . . . that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *General Motors Corp. v. Tracy,*

519 U.S. 278, 287 (1997) (citations and quotations omitted). "Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-37.

It is well-established that "a statute [or judicial interpretation of state law] that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336.[10] Moreover, "the practical effect of [the state law] . . . must be evaluated not only by considering the consequences of the [law] itself, *but also by considering how the challenged [law] may interact with the legitimate regulatory regimes of other States. . . .*" *Id.* In the end, a state law "that violates the extraterritoriality ban is per se invalid." *Dean Foods Co. v. Brancel*, 187 F.3d 609, 616 (7th Cir. 1999) (citing *Healy*, 491 U.S. at 336) (emphasis added).

The "critical inquiry" therefore is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. Here, the Eleventh Circuit's expansive application of Georgia contract law has the "practical effect" of extraterritorially regulating the contractual rights and obligations of Petitioner and

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10. Judicial decisions are, of course, part of the "law" of a State. *See Gore*, 517 U.S. at 573 n.17 ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."); *see also Erie*, 304 U.S. at 78 (explaining that the "law" of state is "the law of the state [as] declared by its Legislature in a statute or by its highest court in a decision"); *United States v. Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998) (quoting *Comm'n v. Estate of Bosch*, 387 U.S. 456, 464 (1967)) ("The United States Supreme Court has pronounced that 'judicial decisions' are laws of the state within the meaning of the Rules of Decision Act.").

Respondents throughout the Nation and inducing future out-of-state accommodations by other contracting parties seeking to protect their voluntary agreements. It is beyond dispute that the Eleventh Circuit's invocation of Georgia law to *invalidate* a non-competition agreement entered into in interstate commerce (as distinguished from the district court's narrow refusal to *enforce* the non-compete agreement within Georgia) regulates conduct beyond the State's borders. The Eleventh Circuit declared that its judgment would have preclusive effect nationwide. *See* Pet. 21a-22a. Consequently, by invoking Georgia law to void the contract and project the declaratory judgment nationwide, the Eleventh Circuit has imposed Georgia's public policy choice on the other 49 States. This is precisely the kind of extraterritorial application of state law that the Commerce Clause forbids.

The Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), illustrates this point. There, the Court addressed the constitutionality of the Illinois Takeover Act (the "Act") which, "unless complied with, . . . sought to prevent MITE from making its [takeover] offer and concluding interstate transactions not only with . . . stockholders living in Illinois, but also with those living in other States and having no connection with Illinois." *Id.* at 642. Hence, "the Illinois law on its face would apply even if not a single one of [the] shareholders were a resident of Illinois, since the Act applies to every tender offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois." *Id.*

In the *Edgar* Court's view, the Act "directly regulate[d] transactions which take place across state lines, even if wholly outside the State of Illinois." *Id.* at 641. The Court therefore found that the Act was "a direct restraint on interstate commerce" with "a sweeping extraterritorial

effect." *Id.* at 642. "The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere. The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial." *Id.* at 643; *see also Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.").

The Georgia law of non-compete agreements is no different. Under the Eleventh Circuit's reasoning, even if sophisticated parties to an interstate non-compete agreement have agreed to regulate their disputes with reference to the law of a particular State by adopting a choice-of-law provision, a party can avoid the contract by establishing minimum contacts with Georgia, seeking a declaration that the agreement is void, and negating the agreement in every other State in the Union. Thus, based on a far less substantial foundation than even the tenuous corporate connections at issue in *Edgar*, once a party succeeds in bringing Georgia law to bear on the contract, the resulting decision has "a nationwide reach" which effectively grants Georgia "the power to determine" whether an interstate contract is valid anywhere. 457 U.S. at 643.[11] For these reasons as well,

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11. Other courts have taken a far more circumspect remedial approach in similar circumstances. *See, e.g.*, *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 193 (Ky. 2001) ("Imposing the policy choice by the Commonwealth on the employment practices of our sister states should be done with great prudence and caution out of respect for the sovereignty of other states, and to avoid running afoul of the Commerce Clause of the United States Constitution."); *Campbell v. Arco Marine, Inc.*, 50 Cal. Rptr. 2d 626, 631-32 (Cal. Ct. App. 1996) ("Applying the FEHA in this situation would raise serious constitutional concerns. 'The Commerce Clause . . . precludes

(Cont'd)

certiorari should be granted to overturn the Eleventh Circuit's nationwide projection of Georgia's anomalous rule against non-compete agreements in violation of the Commerce Clause.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the petition, the Court should grant the petition on the question presented and reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.") (quoting *Edgar*, 457 U.S. at 642-43).

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No. 05-274

In The

Supreme Court of the United States

MARSH & MCLENNAN COMPANIES, INC.,
Petitioner,

v.

PALMER & CAY, INC. and JAMES B. MEATHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents' opposition all but ignores the significant issues of constitutional law and federalism presented in this case. Rather than engaging these issues or attempting to explain why they do not merit this Court's attention, respondents mischaracterize both the nature of this case and the arguments made by petitioner Marsh & McLennan ("Marsh") here and in the proceedings below.

Contrary to respondents' suggestions, this case is not about the scope of claim or issue preclusion or whether there should be an exception to the Full Faith and Credit Clause. This is the *first* lawsuit between these parties, not the second. Thus, this case has to do with the proper scope of the original judgment declaring that Marsh cannot enforce its non-solicitation agreements because of Georgia public policy. The issue of preclusive effect will not arise until the judgment is invoked in a later case. Accordingly, respondents' version of the Question Presented—"[w]hether the final judgment of a federal court sitting in Georgia . . . is *res judicata* as between those parties" (Resp. Br. i)—altogether misses the point.

The real issue in this case is whether constitutional principles of federalism and state sovereignty restrict the scope of declaratory relief when a court is applying one State's unique public policy against enforcing certain types of contracts. Because of the breadth of the Full Faith and Credit Clause—which Marsh agrees bears few exceptions—an unlimited declaratory judgment like the one entered here would effectively void the non-solicitation agreements in their entirety, even with respect to conduct in States that would

enforce the contracts as the parties intended. As the petition makes clear, this result is inconsistent with basic notions of federalism and state sovereignty as recognized in the decisions of this Court.

As we show below in Section I, respondents' attempt to recast the issue in this case cannot obscure this fundamental point. Section II rebuts respondents' suggestion that Marsh waived some of its constitutional arguments below. And Section III rebuts respondents' effort to downplay the practical significance of the issues presented.

ARGUMENT

I. Respondents are incorrect in attempting to recast this case as one that turns on principles of claim and issue preclusion rather than constitutional principles of federalism and state sovereignty.

This case gives the Court an opportunity to decide whether constitutional principles of federalism and state sovereignty limit the scope of declaratory relief when that relief is based on one State's public policy against enforcing an otherwise valid contract. As explained in the petition, the Eleventh Circuit's decision that such relief could *not* be limited to Georgia impermissibly imposes Georgia's public policy choices on other States.

Respondents make little effort to justify the expansive reach of the relief granted below. Instead, they mischaracterize the nature of this case by casting the Eleventh Circuit's decision as one "based on fundamental, straightforward claim and issue preclusion." Resp. Br. 4. Contrary to respondents' characterization, however, this case is not about whether the judgment here would be entitled to

preclusive effect in other federal and State courts. Indeed, the preclusive impact of the judgment has not been joined as an issue, and Marsh is not pressing for any limitation on the tenets of comity embodied in the Full Faith and Credit Clause (U.S. Const., art. IV, § 1).

Moreover, respondents' assertion that the nationwide declaratory judgment entered here is "required" by preclusion principles is mystifying. *See* Resp. Br. 5. Both res judicata (claim preclusion) and collateral estoppel (issue preclusion) prevent relitigating claims and issues a second time in a successive lawsuit. *See New Hampshire* v. *Maine*, 532 U.S. 742, 748-49 (2001). But Marsh is not seeking to relitigate claims or issues decided in an earlier case; instead, it is directly challenging the scope of the original declaratory relief granted by the Eleventh Circuit. Preclusion has no bearing on the propriety of the remedy fashioned in the original case.

If anything, the possible preclusive effect of the judgment in this case only underscores the need for this Court's review. If allowed to stand, and if respondents prevail in their preclusion arguments, the Eleventh Circuit's decision will operate to preclude enforcement of these non-solicitation agreements in other States that bear a closer connection both to the agreements themselves and to the offending conduct. It is one thing to say that the judgment here precludes relitigation of whether the non-solicitation agreements prevent respondent Meathe and his new employer from taking Marsh's clients in Georgia—and it certainly would. It is quite another to say that a judgment invalidating an agreement solely by operation of Georgia public policy should bind the parties from attempting to enforce the agreement even as to matters unrelated to Georgia, such as a dispute

over the recruitment of a client or employee in New York or some other State that would enforce the contracts as the parties intended.

Ordinarily, issue preclusion does not apply when the subsequent litigation concerns issues that are governed by another State's law, because variations in state law defeat the requirement of issue identity. *See* 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRAC. & PRO. § 4417, at 449 (2d. ed 2002) (for purposes of preclusion, issues are not identical if the second action involves application of a different legal standard); *accord Boomer* v. *AT&T Corp.*, 309 F.3d 404, 422 n.10 (7th Cir. 2002); *Eng'rs Club* v. *United States*, 791 F.2d 686, 688 (9th Cir. 1986); *Guild Trust* v. *Union Pac. Land Res. Corp.*, 682 F.2d 208, 211 (10th Cir. 1982). But if a declaratory judgment based on Georgia's public policy exception cannot be limited in scope to the State of Georgia—as the Eleventh Circuit held in this case—then the Georgia law will be projected well outside the State to control transactions everywhere else as well. Thus, the potential preclusive effect of the decision below only underscores its unconstitutionality.

Nor is there any merit to respondents' attempt to bolster their position by asserting that the Eleventh Circuit's decision "is consistent with Constitutional Full Faith and Credit requirements applicable to state court judgments." Resp. Br. 5. To the contrary, the Eleventh Circuit's decision flouts this Court's decisions under the Full Faith and Credit Clause by allowing Georgia to trump the laws of its sister States based on its own policy judgments. As this Court has made clear, full faith and credit "does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."

Nevada v. *Hall*, 440 U.S. 410, 423-24 (1979) (quoting *Pac. Employers Ins. Co.* v. *Indus. Accident Comm'n*, 306 U.S. 493, 504-05 (1939)). Yet the broad declaratory judgment mandated by the Eleventh Circuit in this case permits Georgia to impose its unique policy judgments on other States merely because Meathe and his new employer were able to beat Marsh to the courthouse and subject them to suit in Georgia. This is flatly inconsistent with this Court's decisions and provides yet another reason for plenary review.

II. This Court can and should consider all the constitutional implications of the Eleventh Circuit's decision.

Contrary to respondents' repeated suggestions, the federalism and state sovereignty issues presented in the petition were fully preserved in the proceedings below. After the district court declared that the non-solicitation agreements were "unenforceable within the State of Georgia" (App. 43a) and granted respondents' motion to enjoin enforcement of the agreements "against Meathe in Georgia" (App. 43a-44a), the parties argued at length in the Eleventh Circuit about whether this geographical limitation was appropriate under—or in fact required by—federal law. At that time, the controlling case on this issue in the Eleventh Circuit was *Keener* v. *Convergys Corp.*, 342 F.3d 1264 (11th Cir. 2003), which held that Georgia law could not be used to enjoin the enforcement of a non-solicitation agreement nationwide. *See id.* at 1269 ("Georgia cannot in effect apply its public policy decisions nationwide—the public policy of Georgia is not that everywhere."). Marsh relied heavily on *Keener* in arguing that "no Georgia court may bootstrap Georgia's public policy on restrictive covenants into a *nationwide* declaration that a particular restrictive covenant is unenforceable

everywhere" and contended that the panel in this case was not free to ignore or overrule *Keener*. Consol. Resp. to Cross-Appeal & Reply Br. at 24 *et seq.*

Moreover, when the Eleventh Circuit refused to apply *Keener* with respect to the declaratory judgment, Marsh argued strenuously that this new rule of Eleventh Circuit law "violate[d] settled constitutional principles governing relationships among the various sovereigns that make up the United States," relying upon the same authorities and arguments raised in the petition for a writ of certiorari. Pet. for Panel Reh'g & Reh'g En Banc at 13-15. Both these arguments and those made in the briefs on the merits of the appeal show that Marsh fully preserved the federalism and state sovereignty issues now presented to this Court.

Respondents also mischaracterize the record when they state that Marsh "conced[ed] in the District Court at oral argument that Georgia law applied" and then "did not contend on appeal that it was error for the District Court to apply Georgia law." Resp. Br. 4. In fact, Marsh argued from the beginning that New York law, rather than Georgia law, could and should govern these agreements. *See, e.g.*, Opp. to Pl.'s Mot. for J. on Pleadings at 6 n.3. Far from agreeing to the application of Georgia law, Marsh acknowledged only that, under Georgia *choice-of-law rules*, Georgia courts first determine whether the application of the choice-of-law provision would have a result that is inconsistent with Georgia public policy, and if so, they go no further in terms of choice-of-law analysis. *See, e.g.*, Hrg. Tr. 3 (Oct. 27, 2003). And on appeal—as now—Marsh's central argument was always that Georgia law cannot and does not govern the enforceability of contracts *outside* Georgia. Thus, in the district court as well as

the court of appeals, Marsh preserved the issue presented in the petition.

III. The decision below has broad and damaging consequences for U.S. commerce.

In their effort to underplay the consequences of the Eleventh Circuit's decision, respondents offer little more than the bare assertion that it will not deprive employers of the economic benefits of non-solicitation agreements. Resp. Br. 11. This assertion is simply wrong.

Contrary to respondents' suggestion (Resp. Br. 2, 9), the Eleventh Circuit's rule is not limited to cases in which the party seeking the declaratory relief is a resident of Georgia. Although Meathe and his new employer are both residents of Georgia, the Eleventh Circuit's reasoning did not depend on their *residency*; it depended on their *choice of forum*. Under the Eleventh Circuit's decision, a plaintiff with no connection to Georgia could submit to the jurisdiction of the Georgia courts by filing a complaint. And as long as the defendant is subject to jurisdiction in the Georgia, the forum State's public policy would trump the parties' contractual choice of law, even if the contract itself—both in its formation and in its enforcement—had nothing to do with Georgia.

Thus, while respondents are correct that "Georgia courts are not open to 'just anyone'" (Resp. Br. 2)—and Marsh has never suggested that they were—the only requirement that the Eleventh Circuit's decision imposes for nationwide relief is that the defendant must have transacted some business in Georgia.

Indeed, respondents' own lawsuit illustrates the danger of the Eleventh Circuit's rule. Respondents contend that the issue here is "whether respondent

Meathe, a Georgia resident, can seek a Georgia court's protection when a corporation *seeks to enforce a contract in Georgia* that is unenforceable under Georgia law and public policy." Resp. Br. 9 (emphasis added). If respondents were truly seeking relief *only* from Marsh's supposed attempt to "enforce a contract in Georgia" (*id.*), then the Eleventh Circuit reached well beyond the scope of the controversy when it held that the declaratory judgment could not be limited to the enforcement of the contract in Georgia. But in any event, it was *respondents* who brought this dispute to Georgia—notwithstanding that Marsh had never attempted to enforce the contract "in Georgia"—and then obtained a declaratory judgment that was not limited to Georgia. Thus, the contract's enforceability nationwide turned on nothing more than the fact that respondents won the race to the courthouse.

Finally, the rule Marsh seeks in this case does not require endless relitigation of claims, as respondents suggest. Resp. Br. 11. Marsh does not contend that the enforceability of a restrictive covenant should ordinarily be litigated on a State-by-State basis. To the contrary, the contract in this case provided that it would be governed by New York law, and thus the enforceability of that contract should ordinarily have been litigated only once: in a court that applies the law chosen by the parties. A court that has jurisdiction over the parties and that applies the choice-of-law provision in the contract is free to enter declaratory relief that holds the contract "enforceable" or not, without any geographical limitation. But under the constitutional principles discussed above, a court that *refuses* to honor the contractual choice of law based on

the forum State's public policy cannot provide relief beyond that State.

It was respondents' choice—and almost certainly a deliberate one—to file their lawsuit in Georgia rather than in a court that would have given effect to the contractual choice of law provision. Having made that choice, they cannot complain about any "burden" they will suffer if the relief they are able to obtain based on Georgia public policy is limited to Georgia.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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